Docket #0076 Date Filed: 11/12/2026

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

In re: HIGHLAND CAPITAL MANAGEMENT, L.P., Reorganized Debtor.	Chapter 11 Case No. 19-34054-sgj11
HUNTER MOUNTAIN INVESTMENT TRUST, Plaintiff, v. JAMES D. DONDERO; SCOTT ELLINGTON; ISAAC LEVENTON; STRAND ADVISORS, INC.; NEXPOINT ADVISORS, L.P.; HIGHLAND CAPITAL MANAGEMENT FUND ADVISORS, L.P.; DUGABOY INVESTMENT TRUST AND NANCY DONDERO, AS TRUSTEE OF DUGABOY INVESTMENT TRUST; GET GOOD TRUST AND GRANT JAMES SCOTT III, AS TRUSTEE OF GET GOOD TRUST; MASSAND CAPITAL, LLC; MASSAND CAPITAL, INC.; AND SAS ASSET RECOVERY, LTD., Defendants.	Adv. Pro. No. 21-03076-sgj **Civil Action No. 3:22-CV-203-S** *Consolidated with:* Case No. 3:22-CV-229 Case No. 3:22-CV-253 Case No. 3:22-CV-367 Case No. 3:22-CV-369 Case No. 3:22-CV-370 **PLAINTIFF'S RESPONSE TO DEFENDANTS' MOTION TO DISMISS**

SAWNIE A. MCENTIRE
Texas Bar No. 13590100
PARSONS MCENTIRE MCCLEARY PLLC
1700 Pacific Avenue, Suite 4400
Dallas, Texas 75201
(214) 237-4300
(214) 237-4340 [Fax]
smcentire@pmmlaw.com
mmarconi@pmmlaw.com

Attorneys for Plaintiff Hunter Mountain Investment Trust



TABLE OF CONTENTS

TABLE OF AUTHORITIES vi

PRELIMINARY STATEMENT 1

FACTUAL BACKGROUND AND CORE ALLEGATIONS 3

ARGUMENT 4

I. Familiar Standards Govern the Motion, and They Do Not Permit Defendants to Try the Case on the Papers 4

A. On a facial jurisdictional challenge, the Court accepts the SAC's allegations 4

B. Rule 12(b)(6) tests plausibility, not proof 6

C. Rule 9(b) applies to actual fraud causes of action, not to constructive avoidance or preference claims 6

D. Affirmative defenses justify dismissal only when conclusive on the face of the SAC 7

II. The Court Has Subject Matter Jurisdiction and Should Not Abstain 7

A. The SAC arises under title 11 because it asserts Chapter 5 avoidance and recovery claims 7

B. The Chapter 5 claims are also federal questions under 28 U.S.C. § 1331 8

C. *Craig's Stores* does not control a reserved Plan action that includes Chapter 5 claims 9

D. *Royal Canin* did not "remake" this suit; substitution of HMIT simply continued the same action 10

E. *Royal Canin* preserved the time-of-filing rule for a successor-in-interest 12

F. Defendants fail to recognize that 28 U.S.C. § 1367(a) covers the related state-law counts through supplemental jurisdiction 15

G. Abstention is unwarranted 17

III. HMIT Has Standing to Prosecute the Reserved Claims 21

A. The approval and substitution orders assigned the reserved claims ..……. 21

B. Defendants' other standing challenges also fail ……...……..... 23

C. The Plan reserved the claims Defendants say were not retained ……..... 25

D. HMIT is the real party in interest ……...…… 27

IV. Defendants' Arguments that Plaintiff's Claims are Time-Barred are Flat Wrong ….. 27

A. Defendants' demonstrative tables attached to their Motion contradict their requests for dismissal ……..……..…… 28

B. This action was timely commenced, and the Bankruptcy Code fixes the relevant lookback periods ……..... 30

C. The "lifeboat" claims rest on separately accruing conduct, not on two dates in 2011 and 2012 ……. 31

D. Limitations cannot be resolved against HMIT because the SAC pleads tolling ……. 33

1. The fiduciary duty claims were inherently undiscoverable while Dondero controlled Highland ……...……. 33

2. Highland's "knowledge" was the wrongdoers' knowledge, which is not imputed to Highland ……...……. 34

3. Defendants' public-records argument raises fact questions the Court cannot resolve on a motion to dismiss ……. 35

4. TUFTA's discovery provision preserves the actual-fraud claims ……. 35

5. At a minimum, the Court should grant leave to amend ……..……. 37

E. The SAC identifies actual creditors who could have avoided the transfers, and the IRS's rights reach the earlier transfers ……. 37

1. UBS, the Redeemer Committee, Daugherty, and Acis could have avoided every transfer made on or after October 16, 2015 ……. 37

2. The IRS was an actual creditor ……...……..……. 39

3. Defendants' remaining objections raise questions of fact ..……. 40

V. Prior Note-Collection Actions Do Not Bar the Reserved Claims ……. 41

A. There is no identity of parties for purposes of *res judicata* …….. 41

B. The note-collection actions involved a different nucleus of operative facts ….. 43

VI. The LPA Does Not Excuse Bad-Faith Self-Dealing ……... 44

A. The LPA does not eliminate fiduciary duties ……..…….. 47

B. The LPA provides no safe harbors for Defendants' wrongful conduct ……... 48

C. Willful misconduct and bad faith allegations are not protected …… 51

VII. The SAC Does Not Assert Legal Malpractice Claims ……..... 52

A. The gravamen of the claims does not arise from legal services …….. 53

B. Texas anti-fracturing rules do not apply ….……..... 55

C. Defendants' remaining malpractice-based arguments also fail ……..….. 58

VIII. The SAC Satisfies Rules 8(a) and 9(b) ……..……..… 60

A. Rule 8(a) applies to constructive fraudulent-transfer or preference claims … 61

B. The intentional fraudulent-transfer counts plead badges of fraud and transaction-specific facts ……..... 61

C. The SAC does not engage in improper group pleading ……..…….. 65

D. Aiding-and-abetting and conspiracy are pled in identified transactions ……..…… 65

E. The restitution, alter ego, conversion, and tortious interference counts state claims ….…….. 67

1. Unjust enrichment and money had and received ……. 67

2. The declaratory and alter ego counts ……..…….. 69

3. Conversion …….. 71

4. Tortious interference ……..……. 72

F. The preference count states a claim ……..…. 73

G. If the Court finds any count deficient, leave to amend should be granted …….. 75

CONCLUSION ……..…….……. 75

CERTIFICATE OF SERVICE …….……..……..…….…… 76

TABLE OF AUTHORITIES

CASES

Ad Hoc Comm. of Equity Holders of Tectonic Network, Inc. v. Wolford,
554 F. Supp. 2d 538 (D. Del. 2008) 51

Agar Corp. v. Electro Circuits International, LLC,
580 S.W.3d 136 (Tex. 2019) 29

Allen v. Encore Energy Partners, L.P.,
72 A.3d 93 (Del. 2013) 45

In re Anadrill Directional Servs.,
2026 Bankr. LEXIS 302 (Bankr. S.D. Tex. Feb. 4, 2026) 61

Ashcroft v. Iqbal,
556 U.S. 662 (2009) 6

Barker v. Eckman,
213 S.W.3d 306 (Tex. 2006) 29, 31, 32

Bank of La. v. Craig's Stores of Tex., Inc. (In re Craig's Stores of Tex., Inc.),
266 F.3d 388 (5th Cir. 2001) 2, 9, 10

Beck v. Law Offices of Edwin J. (Ted) Terry, Jr., P.C.,
284 S.W.3d 416 (Tex. App.—Austin 2009, no pet.) 57

Bell Atlantic Corp. v. Twombly,
550 U.S. 544 (2007) 6

Benchmark Elecs., Inc. v. J.M. Huber Corp.,
343 F.3d 719 (5th Cir. 2003) 61

Border Demolition & Envtl., Inc. v. Pineda,
535 S.W.3d 140 (Tex. App.—El Paso 2017, no pet.) 23

Borderlon v. Peck,
661 S.W.2d 907 (Tex. 1983) 33

Britton v. Seale,
81 F.3d 602 (5th Cir. 1996) 56

Brookshire Bros. Holding, Inc. v. Dayco Prods., Inc.,
554 F.3d 595 (5th Cir. 2009) 19

Browning Interests v. Allison (In re Holloway),
955 F.2d 1008 (5th Cir. 1992) 24

Burrow v. Arce,
997 S.W.2d 229 (Tex. 1999) 60

Cadle Co. v. Pratt (In re Pratt),
2003 Bankr. LEXIS 1512 (Bankr. N.D. Tex. Nov. 19, 2003) 13, 14

Carlton v. Baww, Inc.,
751 F.2d 781 (5th Cir. 1985) 7

Charles v. Tamez,
878 S.W.2d 201 (Tex. App.—Corpus Christi 1994, writ denied) 59

Childs v. Haussecker,
974 S.W.2d 31 (Tex. 1998) 33, 35

Cincinnati SMSA Ltd. P'ship v. Cincinnati Bell Cellular Sys. Co.,
708 A.2d 989 (Del. 1998) 49

In re Coho Energy, Inc.,
309 B.R. 217 (Bankr. N.D. Tex. 2004) 18

Compton v. Anderson (In re MPF Holdings US LLC),
701 F.3d 449 (5th Cir. 2012) 27

Cont'l Ins. Co. v. Rutledge & Co.,
750 A.2d 1219 (Del. Ch. 2000) 48, 49

In re Covington Grain Co.,
638 F.2d 1362 (5th Cir. 1981) 22, 27

Crescent Res. Litig. Tr. v. Nexen Pruet, LLC (In re Crescent Res., LLC),
2012 Bankr. LEXIS 287 (Bankr. W.D. Tex. Jan. 23, 2012) 64

Doddy v. Oxy USA, Inc.,
101 F.3d 448 (5th Cir. 1996) 15

Dohmen v. Goodman,
234 A.3d 1161 (Del. 2020) 55

Dondero v. Highland Cap. Mgmt., L.P.,
105 F.4th 830 (5th Cir. 2024) 2

Double Eagle Energy Servs., L.L.C. v. MarkWest Utica EMG, L.L.C.,
936 F.3d 260 (5th Cir. 2019) 12, 13, 14

Dunn v. HPS Investment Partners, LLC (In re Alta Mesa Resources, Inc.),
2024 Bankr. LEXIS 2431 (Bankr. S.D. Tex. Oct. 1, 2024) 6

Dynasty Oil & Gas, LLC v. Citizens Bank (In re United Operating, LLC),
540 F.3d 351 (5th Cir. 2008) 25, 26, 27

Ebner v. Kaiser (In re Kaiser),
525 B.R. 697 (Bankr. N.D. Ill. 2014) 39, 40

Edwards v. Dunlop-Gates,
344 S.W.3d 424 (Tex. App.—El Paso 2011, pet. denied) 58

Edwards v. Mid-Continent Office Distribs., L.P.,
252 S.W.3d 833 (Tex. App.—Dallas 2008, pet. denied) 67

EH Nat'l Bank v. Tran,
2016 U.S. Dist. LEXIS 102301 (N.D. Tex. Aug. 4, 2016) 56

In re Enron Corp. Sec.,
535 F.3d 325 (5th Cir. 2008) 10

EPCO Carbon Dioxide Prods., Inc. v. JP Morgan Chase Bank, N.A.,
467 F.3d 466 (5th Cir. 2006) 7

Eubanks v. FDIC,
977 F.2d 166 (5th Cir. 1992) 43, 44

Exxon Mobil Corp. v. Rincones,
520 S.W.3d 572 (Tex. 2017) 32

FDIC v. Dawson,
4 F.3d 1303 (5th Cir. 1993) 34, 59, 64

FDIC v. Shrader & York,
991 F.2d 216 (5th Cir. 1993) 34

Faulkner v. Lone Star Brokering, LLC (In re Reagor-Dykes Motors, LP),
2021 Bankr. LEXIS 1643 (Bankr. N.D. Tex. June 18, 2021) 64

Feeley v. NHAOCG, LLC,
62 A.3d 649 (Del. Ch. 2012) 45

First United Pentecostal Church of Beaumont v. Parker,
514 S.W.3d 214 (Tex. 2017) 59

Freeport-McMoRan Inc. v. K N Energy, Inc.,
498 U.S. 426 (1991) 12, 13, 14, 15

Gerber v. Enterprise Products Holdings, LLC,
67 A.3d 400 (Del. 2013) 47

Gibson v. Ellis,
126 S.W.3d 324 (Tex. App.—Dallas 2004, no pet.) 57

Gober v. Terra + Corp. (In re Gober),
100 F.3d 1195 (5th Cir. 1996) 18

Gotham Partners, L.P. v. Hallwood Realty Partners, L.P.,
817 A.2d 160 (Del. 2002) 55

Great Plains Tr. Co. v. Morgan Stanley Dean Witter & Co.,
313 F.3d 305 (5th Cir. 2002) 37

Guerriero v. Kilroy (In re Kilroy),
2008 Bankr. LEXIS 827 (Bankr. S.D. Tex. Mar. 24, 2008) 46

Hart v. Bayer Corp.,
199 F.3d 239 (5th Cir. 2000) 75

Heldenfels Bros., Inc. v. City of Corpus Christi,
832 S.W.2d 39 (Tex. 1992) 67

In re Hennessy Cap. Acquisition Corp. IV S'holder Litig.,
318 A.3d 306 (Del. Ch. 2024), aff'd, 337 A.3d 1214 (Del. 2024) 49

Hillen v. City of Many Trees, LLC (In re CVAH, Inc.),
570 B.R. 816 (Bankr. D. Idaho 2017) 39, 40, 41

Hitt v. City of Pasadena,
561 F.2d 606 (5th Cir. 1977) (per curiam) 75

Hollis v. Hill,
232 F.3d 460 (5th Cir. 2000) 55

Houston Nat'l Bank v. Biber,
613 S.W.2d 771 (Tex. App.—Houston [14th Dist.] 1981, writ ref'd n.r.e.) 72

In re Houston Reg'l Sports Network, L.P.,
514 B.R. 211 (Bankr. S.D. Tex. 2014) 20

Ins. Corp. of Ir. v. Compagnie des Bauxites de Guinee,
456 U.S. 694 (1982) 17

Int'l Bankers Life Ins. Co. v. Holloway,
368 S.W.2d 567 (Tex. 1963) 67

Janvey v. Alguire,
846 F. Supp. 2d 662 (N.D. Tex. 2012) 65

Janvey v. Democratic Senatorial Campaign Comm., Inc.,
712 F.3d 185 (5th Cir. 2013) 35

Janvey v. Suarez,
978 F. Supp. 2d 685 (N.D. Tex. 2013) 32

JetTexas Oil, LLC v. Hoge (In re Blue Duck Energy, Ltd.),
2026 Bankr. LEXIS 1612 (Bankr. N.D. Tex. June 29, 2026) 13

John Gannon, Inc. v. Tex. Dep't of Transp.,
2025 WL 1179874 (S.D. Tex. Apr. 23, 2025), aff'd as modified,
178 F.4th 906 (5th Cir. 2026) 42

Jones v. Alcoa, Inc.,
339 F.3d 359 (5th Cir. 2003) 33

Kanen v. DeWolff, Boberg & Assocs., Inc.,
2024 U.S. Dist. LEXIS 73488 (N.D. Tex. Apr. 23, 2024) 20

King v. U.S. Dep't of Veterans Affairs,
728 F.3d 410 (5th Cir. 2013) 5

Kinzbach Tool Co. v. Corbett-Wallace Corp.,
160 S.W.2d 509 (Tex. 1942) 66

In re Kipnis,
555 B.R. 877 (Bankr. S.D. Fla. 2016) 39, 40

Lexmark Int'l, Inc. v. Static Control Components, Inc.,
572 U.S. 118 (2014) 25

Life Partners Creditors' Tr. v. Cowley (In re Life Partners Holdings, Inc.),
926 F.3d 103 (5th Cir. 2019) 6, 7, 31, 61, 65

Likover v. Sunflower Terrace II, Ltd.,
696 S.W.2d 468 (Tex. App.—Houston [1st Dist.] 1985, no writ) 58

Lormand v. US Unwired, Inc.,
565 F.3d 228 (5th Cir. 2009) 6

Lujan v. Defenders of Wildlife,
504 U.S. 555 (1992) 25

Malpiede v. Townson,
780 A.2d 1075 (Del. 2001) 55, 58

Manichaean Capital, LLC v. Exela Techs., Inc.,
251 A.3d 694 (Del. Ch. 2021) 70

Matter of Highland Cap. Mgmt., L.P.,
116 F.4th 422 (5th Cir. 2024) 43

McLaughlin v. Martin,
940 S.W.2d 261 (Tex. App.—Houston [14th Dist.] 1997, no writ) 59

Midwestern Cattle Mktg., L.L.C. v. Legend Bank, N.A.,
999 F.3d 970 (5th Cir. 2021) 68

Miller v. Am. Real Estate Partners, L.P.,
2001 Del. Ch. LEXIS 116 (Del. Ch. Sept. 6, 2001) 44, 45

Miller v. HCP Trumpet Invs., LLC,
2018 Del. LEXIS 429 (Del. Sept. 20, 2018) (en banc) 51

In re Mirant Corp.,
675 F.3d 530 (5th Cir. 2012) 40

Mollan v. Torrance,
22 U.S. (9 Wheat.) 537 (1824) 12

In re Moore,
608 F.3d 253 (5th Cir. 2010) 11, 40

Mulvey v. Allstate Ins. Co.,
No. 3:18-cv-1365, 2018 WL 6329695 (N.D. Tex. Dec. 4, 2018) 5

Murphy v. Gruber,
241 S.W.3d 689 (Tex. App.—Dallas 2007, pet. denied) 57

NexPoint Real Est. Partners, L.L.C. v. Highland Cap. Mgmt., L.P.,
No. 25-11185, 2026 WL 2730275 (5th Cir. Sept. 16, 2026) 2

Nguyen v. Watts,
605 S.W.3d 761 (Tex. App.—Houston [1st Dist.] 2020, pet. denied) 29

Norton v. K-Sea Transp. Partners L.P.,
67 A.3d 354 (Del. 2013) 45, 47

Official Stanford Invs. Comm. v. Greenberg Traurig, LLP,
2014 U.S. Dist. LEXIS 190621(N.D. Tex. Dec. 17, 2014) 67

Orix Credit All., Inc. v. Wolfe,
212 F.3d 891 (5th Cir. 2000) 71

Paterson v. Weinberger,
644 F.2d 521 (5th Cir. 1981) 5

Peacock v. Thomas,
516 U.S. 349 (1996) 69, 71

Petro-Hunt, LLC v. United States,
365 F.3d 385 (5th Cir. 2004) 43

Pitts v. Rivas,
709 S.W.3d 517 (Tex. 2025) 56

Poole v. Houston & T.C. Ry. Co.,
58 Tex. 134 (1882) 58

Presley v. Cooper,
284 S.W.2d 138 (Tex. 1955) 72

PXP Producing Co. v. MRC Permian Co.,
342 A.3d 402 (Del. 2024) 69

In re Querner,
7 F.3d 1199 (5th Cir. 1993) 14, 20, 35

Rahl v. Bande,
316 B.R. 127 (S.D.N.Y. 2004) 8

Ramming v. United States,
281 F.3d 158 (5th Cir. 2001) 5

Ranieri v. Advocare Int'l, L.P.,
336 F. Supp. 3d 701 (N.D. Tex. 2018) 68

In re Republic Reader's Serv., Inc.,
81 B.R. 422 (Bankr. S.D. Tex. 1987) 18

Rockwell Int'l Corp. v. United States,
549 U.S. 457 (2007) 11

Rogers v. Zanetti,
518 S.W.3d 394 (Tex. 2017) 59

Royal Canin U.S.A., Inc. v. Wullschleger,
604 U.S. 22 (2025) 2, 10, 11, 12, 13

Sacks v. Tex. S. Univ.,
83 F.4th 340 (5th Cir. 2023) 41

Sci. Accessories Corp. v. Summagraphics Corp.,
425 A.2d 957 (Del. 1980) 55, 57

In re Segerstrom,
247 F.3d 218 (5th Cir. 2001) 34, 58, 59

In re Senior Care Ctrs., LLC,
611 B.R. 791 (Bankr. N.D. Tex. 2019) 20

In re Seven Springs Apartments, Phase II,
34 B.R. 987 (N.D. Ga. 1983) 9

In re Simplexity, LLC,
2017 WL 65069 (Bankr. D. Del. Jan. 5, 2017) 51

Skaggs v. 4907 Corp.,
No. 02-24-00382-CV, 2025 Tex. App. LEXIS 3862
(Tex. App.—Fort Worth June 5, 2025, no pet.) 69

Sommers v. Anixter, Inc. (In re Trailhead Eng'g LLC),
2020 Bankr. LEXIS 3547 (Bankr. S.D. Tex. Dec. 21, 2020) 73

In re South Coast Supply Co.,
91 F.4th 376 (5th Cir. 2024) 8, 11, 14, 27, 40

Southland Securities Corp. v. INSpire Insurance Solutions, Inc.,
365 F.3d 353 (5th Cir. 2004) 65

Spicer v. Laguna Madre Oil & Gas II, L.L.C. (In re Texas Wyoming Drilling, Inc.),
647 F.3d 547 (5th Cir. 2011) 26

Sprint Commc'ns Co. v. APCC Servs., Inc.,
554 U.S. 269 (2008) 25

Staats v. Miller,
243 S.W.2d 686 (Tex. 1951) 67

Straehla v. AL Global Servs., LLC,
619 S.W.3d 795 (Tex. App.—San Antonio 2020, pet. denied) 66

S.V. v. R.V.,
933 S.W.2d 1 (Tex. 1996) 33

Taylor v. Charter Med. Corp.,
162 F.3d 827 (5th Cir. 1998) 7, 35

Taylor v. Scheef & Stone, LLP,
2020 WL 4432848 (N.D. Tex. July 31, 2020) 59

In re Taylor, Bean & Whitaker Mortg. Corp.,
2018 WL 6721987 (Bankr. M.D. Fla. Sept. 28, 2018) 40

Thorpe v. CERBCO, Inc.,
676 A.2d 436 (Del. 1996) 23, 59

In re Tops Holding II Corp.,
646 B.R. 617 (Bankr. S.D.N.Y. 2022) 39

Townsquare Media, Inc. v. Brill,
652 F.3d 767 (7th Cir. 2011) 16

Travelers Indem. Co. v. Bailey,
557 U.S. 137 (2009) 22

Triton Constr. Co. v. E. Shore Elec. Servs., Inc.,
2009 Del. Ch. LEXIS 88 (Del. Ch. May 18, 2009),
aff'd, 988 A.2d 938 (Del. 2010) 55, 57

Tuchman v. DSC Commc'ns Corp.,
14 F.3d 1061 (5th Cir. 1994) 63, 64

In re TXNB Internal Case,
483 F.3d 292 (5th Cir. 2007) 16, 72

United Mine Workers v. Gibbs,
383 U.S. 715 (1966) 15, 16

United States v. Miller,
604 U.S. 518 (2025) 18, 37, 38, 39

United States v. Summerlin,
310 U.S. 414 (1940) 39

In re USACafes, L.P. Litig.,
600 A.2d 43 (Del. Ch. 1991) 46, 52, 54

U.S. Bank N.A. v. Vill. at Lakeridge, LLC,
583 U.S. 387 (2018) 24

U.S. Brass Corp. v. Travelers Ins. Grp., Inc. (In re U.S. Brass Corp.),
301 F.3d 296 (5th Cir. 2002) 9, 10, 22

U.S. Cellular Inv. Co. of Allentown v. Bell Atl. Mobile Sys., Inc.,
677 A.2d 497 (Del. 1996) 49

In re Vaughan Co., Realtors,
498 B.R. 297 (Bankr. D.N.M. 2013) 39, 40

In re Verizon Ins. Coverage Appeals,
222 A.3d 566 (Del. 2019) 69

Vinson & Elkins v. Moran,
946 S.W.2d 381 (Tex. App.—Houston [14th Dist.] 1997, writ dism'd by agr.) 56

In re Viper Prods. & Servs., LLC,
2022 Bankr. LEXIS 1911 (Bankr. N.D. Tex. July 11, 2022) 20

VTX Commc'ns, LLC v. AT&T Inc.,
2020 WL 4465968 (S.D. Tex. Aug. 4, 2020) 51

Walker v. Cadle Co. (In re Walker),
51 F.3d 562 (5th Cir. 1995) 8, 16, 17

Wal-Mart Stores, Inc. v. Sturges,
52 S.W.3d 711 (Tex. 2001) 72

In re Weldon F. Stump & Co.,
373 B.R. 823 (Bankr. N.D. Ohio 2007) 19

Williamson v. Tucker,
645 F.2d 404 (5th Cir. 1981) 5

Willis v. Maverick,
760 S.W.2d 642 (Tex. 1988) 33

Wilson v. Davis,
305 S.W.3d 57 (Tex. App.—Houston [1st Dist.] 2009, no pet.) 69

Wilton v. Seven Falls Co.,
515 U.S. 277 (1995) 71

Wolf v. Ramirez,
622 S.W.3d 126 (Tex. App.—El Paso 2020, no pet.) 58

Won Pak v. Harris,
313 S.W.3d 454 (Tex. App.—Dallas 2010, pet. denied) 57

In re Wood,
825 F.2d 90 (5th Cir. 1987) 18

Young v. U.S. Postal Serv. ex rel. Donahoe,
620 F. App'x 241 (5th Cir. 2015) 75

Zuniga v. Groce, Locke & Hebdon,
878 S.W.2d 313 (Tex. App.—San Antonio 1994, writ ref'd) 56

OTHER AUTHORITY

6 DEL. C. § 17-403(b) 70, 71

6 DEL. C. § 17-1101 ..... 44, 47, 51, 52

11 U.S.C. § 101(31) 24

11 U.S.C. § 102(3) 24

11 U.S.C. § 108 30

11 U.S.C. § 301 30

11 U.S.C. § 363 ..... 14, 21, 22

11 U.S.C. § 502 ..... 37, 40

11 U.S.C. § 523 46

11 U.S.C. § 544 ..... *passim*

11 U.S.C. § 546 30

11 U.S.C. § 547 ..... *passim*

11 U.S.C. § 548 ..... *passim*

11 U.S.C. § 550 ..... 2, 8, 11, 28

11 U.S.C. § 1123(b)(3) 9

26 U.S.C. § 6502 ..... 39, 40, 41

28 U.S.C. § 157 18

28 U.S.C. § 1331 ..... 7, 8, 9, 15

28 U.S.C. § 1334 ..... *passim*

28 U.S.C. § 1367 ..... 8, 15, 16, 17, 20

28 U.S.C. § 3003(c) 40

FED. R. CIV. P. 8(a) 6, 60, 61

FED. R. CIV. P. 8(d) 68, 74

FED. R. CIV. P. 9(b) ..... *passim*

FED. R. CIV. P. 12(b)(1) 5, 8

FED. R. CIV. P. 12(b)(6) 3, 6, 7, 24, 33, 35, 67

FED. R. CIV. P. 15 ..... 37, 75

FED. R. CIV. P. 17 27

FED. R. CIV. P. 25 ..... *passim*

FED. R. CIV. P. 54 71

RESTATEMENT (SECOND) OF JUDGMENTS § 26(1)(b) (1982) 42

TEX. BUS. & COM. CODE § 24.002 38

TEX. BUS. & COM. CODE § 24.005 ..... 38, 41

TEX. BUS. & COM. CODE § 24.006 38

TEX. BUS. & COM. CODE § 24.010 ..... 29, 30, 31, 35

TEX. BUS. ORGS. CODE § 1.102 55

TEX. BUS. ORGS. CODE § 1.104 55

TEX. BUS. ORGS. CODE § 1.105 55

TEX. DISC. RULES PROF'L CONDUCT Preamble ¶ 15 58

TEX. DISC. RULES PROF'L CONDUCT R. 1.13 58

TO THE HONORABLE UNITED STATES DISTRICT JUDGE:

Plaintiff, Hunter Mountain Investment Trust ("HMIT"), submits this Response to Defendants' Motion to Dismiss (Doc. 68), Defendants' Memorandum of Law (Doc. 69), and accompanying Appendix (Docs. 70, 71).[1] HMIT respectfully shows the Court as follows:

PRELIMINARY STATEMENT

HMIT is prosecuting Estate Claims that Highland Capital Management, L.P. ("Highland"), as Debtor, reserved in its Fifth Amended Plan of Reorganization (the "Plan"), which the Bankruptcy Court for the Northern District of Texas approved in February 2021. The Plan created the Litigation Sub-Trust and this trust subsequently assigned the Estate Claims to HMIT with the Bankruptcy Court's approval which followed an evidentiary hearing in which Defendants Dondero and the Dugaboy Investment Trust objected. These objections were overruled. The assignment to HMIT was part of a larger settlement heralded as "one of the most significant developments in the long-running Highland Bankruptcy Case." Bankr. Dkt. 4216 ¶ 2.

The Defendants' Motion targets Plaintiff's Second Amended Complaint (the "SAC"), which HMIT filed pursuant to this Court's directive. The SAC restates the claims the Litigation Trustee originally asserted in this case over five years ago, and HMIT has not added any new causes of action. Rather, the SAC adopts the original causes of action alleging that James Dondero, with the aid of his lieutenants and affiliated entities, stripped Highland of valuable business opportunities and cash by: (i) redirecting Highland's fund advisory contracts; (ii) diverting Highland's business and resources to Dondero's "lifeboat" entities; (iii) orchestrating and concealing the Sentinel transfer to secrete assets away from UBS, one of Highland's largest creditors; (iv) diverting the Grey Royale escrow; and (v) participating in improper distributions

[1] To assist the Court, HMIT's responses to each of the 144 dismissal arguments listed in Defendants' Table of Counts are indexed in Exhibit "A."

and illegal transfers to insiders on the eve of bankruptcy. The SAC also restates the avoidance and recovery claims under sections 544, 547, 548, and 550 of the Bankruptcy Code, which arise under title 11. Jurisdiction over this proceeding first attached under 28 U.S.C. § 1334(b) in 2021 when it was filed, and the Bankruptcy Court previously reached this conclusion. Adv. Dkt. 151 at 17. Nothing has changed since then to undermine that jurisdiction. Indeed, when the Court directed this amendment, Defendants assured the Court their jurisdictional challenge would rest on HMIT's substitution as the plaintiff, not on the SAC itself. It is now clear these assurances were not kept.[2]

Defendants' Motion is the latest in a series of unsuccessful attempts to derail this lawsuit, and it is nothing short of a scattergun challenge in the hopes that something hits.[3] As this Response shows, the Motion misses the target and should be denied in all respects:

- Defendants incorrectly treat a post-confirmation contract case, *Craig's Stores*, as a holding that confirmation and assignment extinguish jurisdiction over reserved Plan causes of action that include Chapter 5 claims;
- Defendants misapply the Supreme Court's decision in *Royal Canin*, relying on changes in the amendment beyond HMIT's substitution after telling the Court they would not do so, while ignoring Fifth Circuit authority since *Royal Canin* establishing the time-of-filing rule that governs jurisdiction in this matter;
- Defendants mistakenly contend that a detailed Plan schedule reserving fiduciary-duty, unjust-enrichment, and distribution-recovery claims, by category and against named defendants, reserved none of them;
- Defendants seek to improperly recast Delaware-based fiduciary-duty claims against Defendants Ellington and Leventon, arising from the same transactions, as Texas legal-malpractice claims;

[2] The Court proposed limiting the amendment to "the cleanup of the parties," "[n]ot otherwise substantive," and Defendants agreed. Status Conf. Tr. 12:8–21 (Doc. 47). Counsel for the Defendants described their jurisdictional theory as "not as a result of an amendment" but "a result of the new plaintiff," and the Court confirmed, without objection, that Defendants would not take a position based on "anything in" the amendment "[o]ther than what's already done, which is you, Hunter Mountain, is the new plaintiff." *Id*. at 48:22–51:21.

[3] This Motion is the latest in a series of positions that Dondero and entities he controls have pressed in connection with Highland's bankruptcy. Courts have repeatedly rejected those positions, and in some instances imposed sanctions. *See NexPoint Real Est. Partners, L.L.C. v. Highland Cap. Mgmt., L.P. (In re Highland Cap. Mgmt., L.P.),* No. 25-11185, 2026 WL 2730275, at *1 (5th Cir. Sept. 16, 2026) (affirming sanction against HCRE Partners, now NexPoint Real Estate Partners, which "filed a claim that its officers knew to be baseless, and spent the following years litigating this claim in bad faith"); *id*. at *2 (observing that Dondero "has earned at least two sanctions for his interference with Highland's bankruptcy"); *Dondero v. Highland Cap. Mgmt., L.P*., 105 F.4th 830, 835–41 (5th Cir. 2024) (affirming a sanction of nearly $500,000 against Dondero for violating a temporary restraining order).

- The Motion advances near-frivolous arguments relating to statutes of limitations, ignoring the discovery rule, fraudulent concealment, and the fact that Dondero exercised absolute control over Highland until 2020 when he was ousted by the unsecured creditors; furthermore, Defendants' own limitations tables, Doc. 69 at 74–77, concede that substantial claims are timely, even as they ask the Court to dismiss some of those same claims in their entirety; and
- Defendants argue that various provisions of the Highland LPA provide them a safe harbor for intentional diversion of assets–but this is not what the LPA says and is not what Delaware law permits.
- Many of Defendants' arguments involve unasserted affirmative defenses and argue the merits of these defenses and the merits of HMIT's claims. This is not the stuff of a Rule 12(b)(6) proceeding.

This proceeding has been pending in federal court since 2021. It has been stayed, abated, and stayed again, causing consistent delay. The Defendants' Motion should be denied in its entirety, and HMIT should be allowed to *finally* proceed on the merits.

FACTUAL BACKGROUND AND CORE ALLEGATIONS

Highland was an investment adviser founded in 1993 by James Dondero and Mark Okada. By the mid-2000s it managed more than $30 billion in assets and employed more than 100 people. SAC ¶¶ 28–31. After the 2008 financial crisis, Highland faced large losses, substantial redemptions, and significant litigation exposure. The recession gave rise to a multitude of lawsuits against Highland threatening crippling damages amounting to hundreds of millions of dollars. SAC ¶¶ 4, 32–34. Faced with this exposure, Dondero began to divert business opportunities and assets from Highland to newly created entities, including Highland Capital Management Fund Advisors, L.P. ("HCMFA") and NexPoint Advisors, L.P. ("NexPoint").

Together with other insider defendants, Dondero caused Highland to transfer its flagship advisory contracts and the substantial fees flowing from those contracts to these new entities. SAC ¶¶ 5–6, 245–48. The SAC also alleges that Dondero and other insiders diverted cash through later fee diversions, the Grey Royale escrow, insider distributions, and eve-of-bankruptcy transfers, while Highland remained undercapitalized and exposed to the claims that culminated in large

awards. This looting, together with several adverse arbitration awards, necessitated Highland's bankruptcy filing. SAC ¶¶ 6, 8, 245–53, 258–61. Defendants' assertion that the $190 million Redeemer award was "the only one identified in the Complaint," Doc. 69 at 3, misstates the SAC, which also alleges the Daugherty verdict, Terry's arbitration award, and the UBS, HarbourVest, and Acis liabilities that produced more than $230 million in additional allowed claims. SAC ¶¶ 71, 85–93. Highland filed its Chapter 11 petition on October 16, 2019, SAC ¶ 12. All causes of action in the SAC are based upon pre-petition conduct.

The Plan reserved the estate's causes of action against Dondero and the other Defendants, including claims under Chapter 5 of the Bankruptcy Code and related state-law claims, and created the Litigation Sub-Trust to prosecute them. Plan Art. I.B.19, IX.E (App. 0518, 0563-64); Schedule of Causes of Action (App. 0401). Marc S. Kirschner, as Litigation Trustee of the Litigation Sub-Trust (the "Litigation Trustee"), filed this adversary proceeding in 2021. On June 30, 2025, the Bankruptcy Court approved a settlement under which the Litigation Trustee assigned the claims to HMIT, the former holder of 99.5% of Highland's limited partnership interests, SAC ¶ 11, and a contingent beneficiary under the Plan. Bankr. Dkt. 4297 ¶¶ 7, 11 (App. 1603–04). On September 5, 2025, the Bankruptcy Court substituted HMIT as plaintiff. Adv. Dkt. 377 (App. 1615).

ARGUMENT

I. FAMILIAR STANDARDS GOVERN THE MOTION, AND THEY DO NOT PERMIT DEFENDANTS TO TRY THE CASE ON THE PAPERS

Defendants ask the Court to dismiss every count in the SAC, but well-recognized pleading standards and established law do not permit that result, and they do not permit Defendants to try intent, insolvency, discovery dates, or the "real" character of a transfer on this paper record.

A. On a facial jurisdictional challenge, the Court accepts the SAC's allegations.

A Rule 12(b)(1) motion is either facial or factual. On a facial attack, the Court looks to the complaint and accepts its well-pleaded allegations as true. *Paterson v. Weinberger*, 644 F.2d 521, 523 (5th Cir. 1981); *Ramming v. United States*, 281 F.3d 158, 161 (5th Cir. 2001). The Court may also consider "the complaint supplemented by undisputed facts evidenced in the record." *King v. U.S. Dep't of Veterans Affairs*, 728 F.3d 410, 413 (5th Cir. 2013). The Court may consider undisputed public records, but a factual attack cannot be used to try the merits, including disputed questions of fraudulent intent, insolvency, or accrual, under the label of jurisdiction. *Williamson v. Tucker*, 645 F.2d 404, 415 (5th Cir. 1981).

Defendants' jurisdictional arguments rely on documents dehors the SAC, including the Bankruptcy Court's December 18, 2025 Status Report and the August 11, 2026 notices of dissolution filed by the Litigation Sub-Trust and the Claimant Trust. Doc. 69 at 10–11, 15–16, 19, 22. HMIT does not dispute what those documents say, and Defendants have asked the Court to take judicial notice of the proceedings in both the bankruptcy case and this adversary proceeding. *Id.* at 2 n.2. HMIT relies on much of the same record, including the Plan, the order approving the assignment of these claims, the substitution order, and Highland's post-confirmation reports, all of which are in Defendants' Appendix. No jurisdictional fact is in dispute. The parties disagree only about the legal consequences of the record, which places Defendants' Motion in the second category described in *King*, and that is a question of law. *King*, 728 F.3d at 413. Fairly read, the documents to which Defendants cite do not establish that original federal court jurisdiction has been lost. *See* Parts II.E, II.G, *infra*.

Nor is this an Article III standing case of the kind described in *Mulvey v. Allstate Ins. Co*., No. 3:18-cv-1365, 2018 WL 6329695 (N.D. Tex. Dec. 4, 2018). HMIT's right to sue is the right of an assignee prosecuting estate claims reserved under a confirmed plan. That question is addressed in Part III. Thus, there is no "injury in fact" inquiry.

B. Rule 12(b)(6) tests plausibility, not proof.

A complaint survives Rule 12(b)(6) if it states a claim that is plausible on its face. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009); *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007). The Court accepts well-pleaded facts as true and must draw all reasonable inferences in the plaintiff's favor. *Lormand v. US Unwired, Inc*., 565 F.3d 228, 232 (5th Cir. 2009). The Court does not weigh competing versions of the same facts; dismissal is not appropriate because Defendants have a different account of the same transactions. That is a merits-based inquiry, and not appropriate in a Rule 12(b)(6) proceeding.

C. Rule 9(b) applies to actual fraud causes of action, not to constructive avoidance or preference claims.

Defendants are wrong in their application of Rule 9(b), which requires particularity only for claims that sound in fraud, and the constructive fraudulent-transfer and preference counts do not. In *Life Partners Creditors' Tr. v. Cowley (In re Life Partners Holdings, Inc.)*, 926 F.3d 103, 117–18 (5th Cir. 2019), the Fifth Circuit noted that district courts in this Circuit apply Rule 8(a), because a constructive fraudulent transfer turns on value and financial condition rather than fraudulent intent, described that reasoning as persuasive, and then declined to decide the question because the allegations were sufficient either way. Courts in this Circuit continue to apply Rule 8(a), not Rule 9(b), to such claims. *See, e.g., Dunn v. HPS Investment Partners, LLC (In re Alta Mesa Resources, Inc.)*, 2024 Bankr. LEXIS 2431, at *33–36 (Bankr. S.D. Tex. Oct. 1, 2024).

Preference claims also are governed by Rule 8(a). In *Life Partners*, the Fifth Circuit decided the preference count under Rule 8(a), dismissing it only because the complaint pleaded no facts on the section 547(b)(5) element. 926 F.3d at 122. Defendants' securities-fraud formulation is not the standard for a constructive avoidance count or a preference count. And even if Rule 9(b)

applied, *Life Partners* treated allegations identifying the transfers, the absence of reasonably equivalent value, and insolvency as sufficiently pled facts. 926 F.3d at 118. Just like here.

D. Affirmative defenses justify dismissal only when conclusive on the face of the SAC.

Limitations, repose, res judicata, release, and contractual exculpation are affirmative defenses that support dismissal only if the defense is conclusively established on the face of the complaint. *EPCO Carbon Dioxide Prods., Inc. v. JP Morgan Chase Bank, N.A.*, 467 F.3d 466, 470 (5th Cir. 2006). Here, a defense that does not appear from the SAC, the documents it relies on, and public records properly subject to judicial notice, is not a basis for dismissal under Rule 12(b)(6). Judicial notice of a filing establishes its existence, but not the truth of its contents or the inferences Defendants labor to draw from it. *Taylor v. Charter Med. Corp.*, 162 F.3d 827, 830–31 (5th Cir. 1998).

II. THE COURT HAS SUBJECT MATTER JURISDICTION AND SHOULD NOT ABSTAIN

The SAC asserts Chapter 5 avoidance and recovery claims, which arise under title 11 and independently support this Court's jurisdiction. 28 U.S.C. § 1334(b). These are also claims arising under federal law. 28 U.S.C. § 1331. As shown below, Defendants' alternative request, that the Court abstain from the § 544(b) claims, is unwarranted.

A. The SAC arises under title 11 because it asserts Chapter 5 avoidance and recovery claims.

Section 1334(b) gives this Court original jurisdiction over civil proceedings arising under title 11. 28 U.S.C. § 1334(b). A proceeding arises under title 11 when the Bankruptcy Code creates the claim. A trustee's action under an avoiding power clearly "arises under title 11," because the trustee claims a right provided by the Code. *Carlton v. Baww, Inc.*, 751 F.2d 781, 787 n.7 (5th Cir. 1985) (quoting H.R. Rep. No. 95-595, at 445–46 (1977), as reprinted in 1978 U.S.C.C.A.N. 5787,

6401). Sections 544, 547, 548, and 550 provide such powers. The assignment from the Litigation Trustee to HMIT did not change that character.

A Chapter 5 claim is property of the estate, and it may be sold, and the purchaser has standing to pursue it, including for its own account unrelated to the bankruptcy. *In re South Coast Supply Co*., 91 F.4th 376, 385 (5th Cir. 2024). Setting aside Defendants' rhetoric, the district court in *South Coast* dismissed the purchaser's preference action for lack of standing, but the Fifth Circuit reversed. *Id.* The avoiding power remains under sections 544, 547, 548, and 550 of the Code, and does not become a state-law claim because an assignee now holds it. Nor does it become one because creditors were later paid.

Defendants' own brief cedes this point. The Section IV heading in their brief asks the Court to dismiss the SAC "in its entirety" under Rule 12(b)(1), but the argument that follows seeks something more narrow: dismissal of the "State Law Claims" and abstention from the "Section 544(b) Claims." Doc. 69 at 12. Defendants' chart of counts does not assert a lack of subject-matter jurisdiction as to the preference and expense-transfer counts (Counts XXVII–XXIX). *Id*. at xvi. And Defendants concede, as they must, that the Court "may have arising-under jurisdiction" over the Chapter 5 theories. *Id*. at 17. To be sure, jurisdiction over one claim does not automatically extend to every other claim in a complaint. *Id*. at 14 (citing *Walker v. Cadle Co. (In re Walker)*, 51 F.3d 562, 569–70 (5th Cir. 1995)). But, under any analysis, this Court's jurisdiction over the Chapter 5 claims arising under title 11 is alive and well and independently supports supplemental jurisdiction in this matter under 28 U.S.C. § 1367(a).

B. The Chapter 5 claims are also federal questions under 28 U.S.C. § 1331.

Section 1334(b) is not the only basis for this Court's jurisdiction. The avoiding powers set forth in sections 544, 547, 548, and 550 are conferred by the Bankruptcy Code, and a claim brought under those sections is a federal question. *Rahl v. Bande*, 316 B.R. 127, 137 (S.D.N.Y. 2004) (a

section 544(b) fraudulent-transfer claim gave the district court jurisdiction under § 1331 "because it involves a federal question," independent of § 1334(b), "and we have supplemental jurisdiction over the remaining claims"); *see also In re Seven Springs Apartments, Phase II*, 34 B.R. 987, 993–94 (N.D. Ga. 1983) ("section 1331 provides an additional, independent basis for this jurisdiction").

C. *Craig's Stores* does not control a reserved Plan action that includes Chapter 5 claims.

Defendants' jurisdictional argument relies heavily on a misapplication of *Bank of La. v. Craig's Stores of Tex., Inc. (In re Craig's Stores of Tex., Inc.)*, 266 F.3d 388 (5th Cir. 2001). Doc. 69 at 13–17. Defendants take a case about a reorganized debtor's post-confirmation dispute with its bank, and treat it as a holding that confirmation, payment of creditors, and an assignment end the Court's jurisdiction over this proceeding. The opinion, however, says no such thing. Although *Craig's Stores* may have limited "related to" jurisdiction after confirmation, it did ***not*** hold that a claim created by the Bankruptcy Code, or a cause of action that is property of the estate prior to the effective date and reserved in a confirmed plan, falls out of federal jurisdiction when the plan becomes effective. That reading would nullify Section 1123(b)(3) (plan may retain estate claims).

Craig's Stores involved a post-confirmation contract suit, in which the reorganized debtor sued its bank over credit-card processing that occurred after confirmation. The contract had been assumed, but the dispute did not depend on the plan and did not concern its implementation. The Fifth Circuit held that "related to" jurisdiction had ended. 266 F.3d at 390–91. Although the Fifth Circuit has applied that test subsequently, it has not expanded the test to bar every post-confirmation proceeding.To the contrary, in *U.S. Brass Corp. v. Travelers Ins. Grp., Inc. (In re U.S. Brass Corp.)*, 301 F.3d 296 (5th Cir. 2002), the Fifth Circuit in *U.S. Brass* specifically determined that post-confirmation jurisdiction remains, so long as the dispute involves implementation of the plan:

> Bankruptcy law will ultimately determine this dispute, and the outcome could affect the parties' post-confirmation rights and responsibilities. Furthermore, this proceeding will certainly impact compliance with or completion of the reorganization plan. Consequently, [it] pertains to the plan's implementation or execution and therefore satisfies the *Craig's Stores* test for post-confirmation jurisdiction. (*Id*. at 304–05).

Here, the Litigation Trustee filed this proceeding to prosecute causes of action the Plan reserved. Plan Art. IV.B, IX.E, Bankr. Dkt. 1943 Ex. A (App. 0539–40, 0563–64); Schedule of Causes of Action, Bankr. Dkt. 1875-3 (App. 0401–17). Prosecuting those claims implemented the Plan, and did not involve a post-confirmation dispute over the reorganized debtor's ordinary business, which is what *Craig's Stores* addressed. In *Enron*, the Fifth Circuit further explained that "[t]he *Craig's Stores* Court did hold that a bankruptcy court may lack jurisdiction over post-confirmation claims based on post-confirmation activities." *In re Enron Corp. Sec*., 535 F.3d 325, 335 (5th Cir. 2008). But that is the limit of the holding. Here, ***every claim in the SAC is based on prepetition and pre-confirmation conduct***: the advisory fund diversions, the Sentinel/UBS transaction, the insider distributions, and the eve-of-bankruptcy payments. SAC ¶¶ 38–40, 45–47, 136–48, 175–87. These are claims the estate owned at confirmation, which the Plan kept alive for the Litigation Trustee to pursue. *Craig's Stores* provides no basis for dismissing them.

D. *Royal Canin* did not "remake" this suit; substitution of HMIT simply continued the same action.

Defendants distort the holding in *Royal Canin U.S.A., Inc. v. Wullschleger*, 604 U.S. 22 (2025), for the proposition that an amendment "changing parties or claims" automatically defeats jurisdiction that existed at filing. Doc. 69 at 18–19. *Royal Canin* is more narrow and, if applied correctly, confirms jurisdiction here.

The plaintiff in *Royal Canin* sued in state court alleging federal and state claims. After removal, she amended her complaint to delete *every federal claim*. As a consequence, the Court held that the amended complaint superseded the original, that jurisdiction must be assessed under

the operative pleading, and nothing remained to support supplemental jurisdiction over the state claims. *Id.* at 25–26, 35–37. The Court drew that rule from *Rockwell*, which applies the same principle to cases originally filed in federal court. *Id*. at 32–33 (citing *Rockwell Int'l Corp. v. United States*, 549 U.S. 457, 473–74 (2007)). Here, however, the SAC still retains the Chapter 5 claims.

The SAC asserts claims arising under Sections 544, 547, 548, and 550, and HMIT's substitution as Plaintiff under Rule 25(c) continued the same action the Litigation Trustee filed five years ago. The SAC did not excise the claims that give this Court original jurisdiction. *Royal Canin*'s statement that "changes in parties, or changes in claims, effectively remake the suit," *id*. at 35–36, describes amendments that change the jurisdictional basis of the case, as when a plaintiff drops the federal claims or adds a party who destroys diversity. It does not describe what happened here where HMIT, the holder of pre-effective date equity interests in the Debtor, acquired the claims pursuant to an assignment approved by the Bankruptcy Court. Defendants cite no authority that has applied *Royal Canin* as Defendants urge.

Notwithstanding their prior assurances to this Court, the Defendants now emphasize changes in the SAC, but none of these changes make the SAC the type of amendment *Royal Canin* addressed. Removal of the claims against settling parties was also ordered by the Court and did not involve a deletion of the claims against any of the *current* Defendants. The fact that a recovery will be paid to HMIT as an assignee rather than to creditors also does not impact jurisdiction. *In re South Coast Supply Co.*, 91 F.4th at 385 ("even if [the purchaser] does not qualify as a representative of the estate, it has standing to pursue the preference claim as it validly purchased the claim outright"). *See also In re Moore*, 608 F.3d 253, 258–62 (5th Cir. 2010) (avoidance claims are estate property that can be sold).

Here, HMIT is not an unrelated third-party assignee, but the holder of a substantial contingent claim for which recovery will benefit HMIT. As reflected in the Bankruptcy Court's Status Report to this Court, "any recovery in the Action will now go to Hunter Mountain as 99.5% equity holder of Highland" since all superior creditors have been paid. (App. 1616). The purpose of the Plan, to effectuate recovery of proceeds, is exactly the consequence of the assignment.

E. *Royal Canin* preserved the time-of-filing rule for a successor-in-interest.

"It has long been the case that 'the jurisdiction of the court depends upon the state of things at the time of the action brought.'" *Freeport-McMoRan Inc. v. K N Energy, Inc.*, 498 U.S. 426, 428 (1991) (quoting *Mollan v. Torrance*, 22 U.S. (9 Wheat.) 537, 539 (1824)). Defendants contend that *Royal Canin* confines that rule to "the facts on the ground," not "the claims and parties that the plaintiff includes in a complaint," so HMIT's substitution allegedly "remake[s] the suit." Doc. 69 at 18–19 (quoting *Royal Canin*, 604 U.S. at 36 n.5). But the Court's next footnote forecloses that reading. The operative-pleading rule "does not apply when an amendment merely substitutes a successor-in-interest," because the successor "steps into the [original party's] shoes, and the ... jurisdiction founded on the initial complaint thus continues." *Royal Canin*, 604 U.S. at 36 n.6 (citing *Freeport-McMoRan*, 498 U.S. at 428–29). *Freeport-McMoRan* is that case. The plaintiffs transferred their interest after filing, the transferee was added under Rule 25(c), and the Court held that jurisdiction at filing "may not be divested by subsequent events." 498 U.S. at 427–28. HMIT stands in the same position.

The Fifth Circuit applied the "time-of-filing" rule to § 1334(b) in *Double Eagle Energy Servs., L.L.C. v. MarkWest Utica EMG, L.L.C.*, 936 F.3d 260 (5th Cir. 2019). There, the debtor filed a contract action related to its bankruptcy and then assigned the claim to a creditor. The

defendants argued that the assignment destroyed subject-matter jurisdiction, but the Court held otherwise:

> Although courts have not often considered the time-of-filing rule for cases related to bankruptcy, it applies to bankruptcy jurisdiction no less than it applies to diversity or federal question jurisdiction…. This means that the related-to-bankruptcy jurisdiction that existed at the outset of this case never went away.

Id. at 263–64. This same rule has been applied even ***after*** *Royal Canin*. *See JetTexas Oil, LLC v. Hoge (In re Blue Duck Energy, Ltd.)*, 2026 Bankr. LEXIS 1612, at *16 (Bankr. N.D. Tex. June 29, 2026) (if bankruptcy jurisdiction existed at the outset, it "does not go away because a claim is assigned to a non-debtor party") (citing *Double Eagle*, 936 F.3d at 263).

Although *Double Eagle* predates *Royal Canin*, Doc. 69 at 20–21, *Royal Canin* did not displace it. Footnote 6 in *Royal Canin* speaks of a defendant and of diversity because that was the setting the Court was addressing, but its reasoning depends on neither. The authority it cites, *Freeport-McMoRan*, involved a transferee of the plaintiffs' interest. And Rule 25(c) draws no distinction between the two sides of a case: when "an interest is transferred, the action may be continued by or against the original party," or the transferee may be substituted. FED. R. CIV. P. 25(c). HMIT was substituted under Rule 25(c), Adv. Dkt. 377 (App. 1615), and it did not file a new suit or drop the Chapter 5 claims. *Royal Canin* therefore leaves *Double Eagle* intact. And even if the Court looks only to the operative pleading, the result is the same. The SAC still asserts claims arising under title 11.

As mentioned, HMIT is not a stranger to the bankruptcy estate. It held almost all prepetition equity (99.5%) in Highland, and holds the corresponding beneficial interests under the Plan. The assignment put the reserved claims in the hands of the party that already held an interest under the Plan. Defendants' reliance on *Cadle Co. v. Pratt (In re Pratt)*, 2003 Bankr. LEXIS 1512 (Bankr. N.D. Tex. Nov. 19, 2003), therefore, is not well taken. Doc. 69 at 16. *Cadle* was a "related to"

dismissal after a trustee sold claims to a buyer with no stake in the case. It was not a Chapter 5 action, and it was not a substitution by a party that held a substantial contingent interest under the Plan. *Double Eagle* and *South Coast* therefore control, and both were decided after *Cadle*.

Defendants also point to *Double Eagle*'s remand. Doc. 69 at 20–21. Having held that jurisdiction survived the assignment, the Fifth Circuit noted the "general rule" that a district court "should" exercise its discretion to dismiss related proceedings once the bankruptcy foundation falls away. It remanded so the district court could make that call "in the first instance." 936 F.3d at 264 (citing *In re Querner*, 7 F.3d 1199, 1201–02 (5th Cir. 1993)). But this rule does not help Defendants because this matter involves Chapter 5 claims arising under title 11. Any "related to" claims in this litigation are pre-petition claims specifically provided for under the Plan, and they are now held by a claimant class established under the Plan to receive such proceeds. Also, the issue of what claims can be brought after a case is closed is not relevant here because Highland's case remains open.

Defendants' reliance on the August 11, 2026, notices filed by the Claimant Trust and the Litigation Sub-Trust does not change the analysis. Doc. 69 at 10–11, 15–16 (citing Bankr. Dkts. 4710, 4711 (App. 1641–45)). Each states that the trust "has dissolved and commenced winding up its affairs." *Id.* at 10. A trust that is winding up has not ceased to exist, Highland's chapter 11 case remains pending, and the notices do not purport to disturb the orders approving the sale of these claims and substituting HMIT. Bankr. Dkt. 4297 (App. 1601–04); Adv. Dkt. 377 (App. 1614–15). By selling the estate claims with court approval under 11 U.S.C. § 363(b) The Litigation Sub-Trust implemented the Plan by monetizing an asset. And a wind-up notice filed nearly five years after this proceeding was commenced is precisely the kind of "subsequent event[]" that cannot divest jurisdiction. *Freeport-McMoRan*, 498 U.S. at 428; *Double Eagle*, 936 F.3d at 263–64.

F. Defendants fail to recognize that 28 U.S.C. § 1367(a) covers the related state-law counts through supplemental jurisdiction.

The Chapter 5 claims and all other claims asserted within the litigation are lodged in this Court under § 1334(b) and § 1331. Also, this Court should note that Section 1367(a) would supply jurisdiction over all other claims that are sufficiently related to the Chapter 5 claims that they form part of the same case or controversy. 28 U.S.C. § 1367(a). These state-law causes of action grow out of the same wrongful transfers: the diversions of business opportunities, the Sentinel/UBS transaction, the Grey Royale escrow, the insider distributions, and the eve-of-bankruptcy fraudulent transfers. 28 U.S.C. § 1367(a); *see United Mine Workers v. Gibbs*, 383 U.S. 715, 725 (1966) (state and federal claims support supplemental jurisdiction when they "derive from a common nucleus of operative fact" and would ordinarily be tried in one proceeding). The Court's supplemental jurisdiction extends to Count V, which seeks to recover the liabilities Highland incurred to UBS, the Redeemer Committee, Acis, and HarbourVest. SAC ¶¶ 184–96. Those are the same creditors on whose rights the § 544(b) counts depend, *id.* ¶¶ 27, 155, 162, and their claims supply the insolvency, intent, and timing allegations on which the avoidance counts rest. Count V is part of the same case. 28 U.S.C. § 1367(a).

The Court, moreover, will not lose jurisdiction over the state-law counts if some bankruptcy-related claims later fall away. The Fifth Circuit rejected that argument in *Doddy v. Oxy USA, Inc.*, 101 F.3d 448 (5th Cir. 1996). There, a case that was bankruptcy-related when it reached federal court later "ceased being bankruptcy related." *Id.* at 455 n.3. The court held that the district court had not "automatically lost subject matter jurisdiction," because jurisdiction that exists when an action is commenced "may not be divested by subsequent events." *Id.* at 456 (quoting *Freeport-McMoRan*, 498 U.S. at 428). The district court "always had subject matter jurisdiction," first under § 1334 and then under § 1367. *Id.* at 456 n.4. And the court did not abuse its discretion by retaining

the state-law claims, because the case had been in litigation for more than two years and the remaining claims "did not raise any novel or unsettled issues of state law." *Id.* at 456. The current proceeding has been pending longer than that, and the pending state-law claims are not novel.

Section 1367(a) provides supplemental jurisdiction "in any civil action of which the district courts have original jurisdiction," and § 1334(b) gives the district courts "original but not exclusive jurisdiction" of proceedings "arising under title 11." 28 U.S.C. §§ 1334(b), 1367(a). *Walker*, on which Defendants rely, does not hold otherwise. The federal claim in *Walker* was the debtor's claim that a creditor violated the automatic stay, and the state-law claim was that creditor's third-party claim for contribution against a separate party. 51 F.3d at 569–70. The Fifth Circuit held that the third-party claim fell outside "related to" jurisdiction and supplemental jurisdiction was not available. *Id*. at 571. But it left open whether a district court could reach the claim under § 1367, deciding the question "[e]ven assuming, arguendo," that it could. *Id*. at 570. This case presents that question, and the statute answers it. As the Seventh Circuit explained, the courts of appeals are divided on whether bankruptcy courts have supplemental jurisdiction. *Townsquare Media, Inc. v. Brill*, 652 F.3d 767, 771 (7th Cir. 2011) (citing *In re TXNB Internal Case*, 483 F.3d 292, 300 (5th Cir. 2007), and *Walker*, 51 F.3d at 571–73). But "once a district court acquires jurisdiction over a claim, it acquires jurisdiction ('supplemental jurisdiction') over closely related claims even if they are based on state law." *Id*.

Walker is also factually distinguishable. The state-law claim there was a defendant's claim against a third party, brought to shift its own liability. Here, the state-law counts are asserted against the same defendants and arise from the same transfers as the Chapter 5 claims. SAC ¶¶ 38–40, 45–47, 136–48, 175–87; *see Gibbs*, 383 U.S. at 725. These state-law claims "derive from a common nucleus of operative fact" with the Chapter 5 claims, and a plaintiff "would ordinarily be expected to try them all in one judicial proceeding." *Gibbs*, 383 U.S. at 725. Although

Defendants ask the Court to "decline supplemental jurisdiction over the balance" of the state-law claims, Doc. 69 at 24, they never explain why § 1367(a) does not reach them and they offer no § 1367(c) analysis to justify declining jurisdiction. Nor can Defendants obtain dismissal of Count XXVI, which they include in their jurisdictional challenge, Doc. 69 at 13; it is asserted only against Massand Capital and SAS, neither of which has joined the Motion. SAC ¶¶ 336–43; Doc. 69 at 1.[4]

G. Abstention is unwarranted.

Defendants do not contend that the Court lacks jurisdiction over the § 544(b) claims, conceding, as they must, that "[t]he Court may have arising-under jurisdiction over those federal theories," Doc. 69 at 17. Yet they ask the Court to abstain "[t]o the extent the Court has arising-under jurisdiction." *Id*. at 21. Abstention is not a finding that jurisdiction is lacking; it presupposes jurisdiction over "a particular proceeding arising under title 11." 28 U.S.C. § 1334(c)(1). And Defendants limit their request to the § 544(b) theories, leaving in this Court the §§ 547 and 548 claims. Doc. 69 at 23.

Mandatory abstention is not available here, and Defendants do not seek it. That leaves Defendants with a "Hail Mary" argument for permissive abstention under § 1334(c)(1), which permits abstention only "in the interest of justice, or in the interest of comity with State courts or respect for State law." The abstention inquiry weighs a familiar set of factors, among them the effect on estate administration, the extent to which state law predominates, whether the proceeding is core, the feasibility of severing state-law claims, the burden on the court's docket, the likelihood

[4] Defendants also quote HMIT's 2022 motion to dismiss, filed when HMIT was a defendant opposing these claims, which argued that the Bankruptcy Court lacked jurisdiction over the "non-core state-law claims." Doc. 69 at 17 (citing Adv. Dkt. 189 at 1, 11). That argument addressed the Bankruptcy Court's "related to" jurisdiction, where *Walker* forecloses supplemental jurisdiction, 51 F.3d at 571–73; it did not address this Court's jurisdiction under § 1367(a). In any event, a party's litigating position can neither confer nor defeat subject-matter jurisdiction. *Ins. Corp. of Ir. v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 702 (1982).

of forum shopping, and the presence of non-debtor parties. *In re Republic Reader's Serv., Inc*., 81 B.R. 422, 429 (Bankr. S.D. Tex. 1987). Each of these factors is addressed below.

The § 544(b) claims are core claims created by the Bankruptcy Code. A proceeding arises under title 11 when it involves "a cause of action created or determined by a statutory provision of title 11." *In re Wood*, 825 F.2d 90, 96 (5th Cir. 1987). Section 544(b) is such a provision, and Congress designated proceedings "to determine, avoid, or recover fraudulent conveyances" as core. 28 U.S.C. § 157(b)(2)(H); *see also id*. § 157(b)(2)(F) (preferences). Just because state law supplies an element does not change the claim's character. *United States v. Miller*, 604 U.S. 518, 524–25 (2025), on which Defendants rely, Doc. 69 at 22, describes the actual-creditor element of § 544(b). It does not suggest that a § 544(b) claim belongs in state court. Fraudulent-transfer law under the Texas Uniform Fraudulent Transfer Act ("TUFTA") and its Delaware counterpart is uniform-act laws that federal courts apply routinely. Nothing about these laws is novel or unsettled.

Abstention would split the same transfers between two courts. Counts I–II and XXVIII–XXIX plead the same transfers under both § 544(b) and § 548. SAC ¶¶ 154–66, 352-61; *see* Doc. 69 at 23 (acknowledging that Counts XXVIII and XXIX plead §§ 544 and 548 in the alternative). On those counts, abstention would send one theory of a transfer to a state court while this Court decides the other theory of the same transfer, on the same evidence and against the same defendants. Defendants' citation to *Gober v. Terra + Corp. (In re Gober)*, 100 F.3d 1195 (5th Cir. 1996), does not support such inefficiencies. *Gober* allows a court to abstain from state-law claims that can be separated from the federal issues, *id.* at 1206–07, not to divide one transfer between two forums. In any event, this Court should not split claims. This would lead to needless delay, expense and waste.

Notions of comity do not support abstention. That permissive abstention is possible without a pending state action, Doc. 69 at 23 (citing *In re Coho Energy, Inc.*, 309 B.R. 217, 219–

20 (Bankr. N.D. Tex. 2004)), does not mean it is warranted, and the absence of any state proceeding here bears heavily on every relevant factor. Abstention would not defer to a state court already engaged with these transactions, as in *In re Weldon F. Stump & Co.*, 373 B.R. 823, 826–29 (Bankr. N.D. Ohio 2007), where a state-court receiver was already pursuing the same transfers. Instead, abstention would require that a case pending in federal court since 2021 be refiled from scratch in state court, causing additional delay, and inviting new procedural and substantive disputes. And the fiduciary-duty counts apply Delaware principles that Defendants themselves ask this Court to apply. Doc. 69 at 47–55.

Judicial economy and fairness weigh heavily against abstention. The Fifth Circuit has held that a court abuses its discretion by relinquishing state-law claims to a state court after a substantial investment of time and resources. *Brookshire Bros. Holding, Inc. v. Dayco Prods., Inc.*, 554 F.3d 595, 602 (5th Cir. 2009). This proceeding has been pending in federal court since October 2021. Adv. Dkt. 1. It has gone through two rounds of motions to dismiss, Adv. Dkts. 129–143, 173–189; a report and recommendation, Adv. Dkt. 151; and a Rule 25(c) substitution, Adv. Dkt. 377. In 2022, moreover, Defendants moved to withdraw the reference so the case would be heard in this Court, and the Bankruptcy Court recommended that final adjudication be reserved here. Report and Recommendation, Adv. Dkt. 151 at 3–4. Having sought this forum, Defendants now ask to leave it only because the plaintiff changed. That is the kind of forum shopping the abstention factors guard against.

The Bankruptcy Court's December 18, 2025, Status Report, on which Defendants heavily rely, Doc. 69 at 10, 15–16, 19, 22 (citing Adv. Dkt. 412 (App. 1618–21)), points the same way. Judge Jernigan never suggested this action belongs in state court. She explained why it should be tried in this Court, and recommended that the reference be withdrawn for all purposes. Her observation that the action will have "no impact on creditor recovery" was offered as a reason for

this Court, rather than the Bankruptcy Court, to preside over the case. It was not a finding that federal jurisdiction had lapsed.

The estate-administration factor does not outweigh the rest. Defendants argue that a recovery will not change creditor distributions. Doc. 69 at 22. But that factor is just one of many, and not dispositive. In any event, the argument ignores the fact that HMIT was a substantial contingent beneficiary under the Plan's Claimant Trust Agreement[5] and, even in the absence of the assignment, would have benefitted from the prosecution of this action. The Court should decline to abstain from the § 544(b) claims and it should not relinquish the related state-law claims under *Querner* or § 1367(c).

Defendants' abstention authorities are inapposite. Doc. 69 at 22–23. Each was a state-court action removed to federal court, and each involved a remand back to the state court. *In re Senior Care Ctrs., LLC*, 611 B.R. 791, 794–96, 801–02 (Bankr. N.D. Tex. 2019) (untimely removed guaranty action, as to which mandatory abstention also applied); *In re Houston Reg'l Sports Network, L.P.*, 514 B.R. 211, 213–17 (Bankr. S.D. Tex. 2014) (removed action asserting only state-law claims); *Kanen v. DeWolff, Boberg & Assocs., Inc.*, 2024 U.S. Dist. LEXIS 73488, at *2–7 (N.D. Tex. Apr. 23, 2024) (single state-law employment claim removed seven days before a state-court trial); *In re Viper Prods. & Servs., LLC*, 2022 Bankr. LEXIS 1911, at *3, *7–10 (Bankr. N.D. Tex. July 11, 2022) (removed action on state-law claims filed before the bankruptcy). None of these cited cases involved claims under Chapter 5 of the Bankruptcy Code. Here, there is no state case to return to, and Defendants identify no decision in which a court abstained from §

[5] "Claimant Trust Beneficiaries" under the Claimant Trust Agreement includes the "Holders of Allowed Class B/C Limited Partnership Interests, and Holders of Allowed Class A Limited Partnership Interests," *i.e.,* HMIT, once the Holders of Allowed Unsecured Claims and Holders of Allowed Subordinated Claims are paid. Claimant Trust Agmt. § 1.1(h) (App. 0585).

544(b) claims while keeping §§ 547 and 548 claims that challenge the same transfers in a proceeding pending in federal court for years.

III. HMIT HAS STANDING TO PROSECUTE THE RESERVED CLAIMS

Defendants' next attack, which also fails, focuses on HMIT's standing to prosecute the claims. Doc. 69 at 24–32. The Plan expressly reserved the estate's causes of action. And to the extent Defendants challenge the Bankruptcy Court's order that approved the assignment to HMIT, they are engaging in an improper collateral attack on an order that followed an evidentiary hearing which the Bankruptcy Court has since declined to disturb not once, ***but three times***. *See* Mem. Op. and Order Regarding Stay Requests (Bankr. Dkt. 4333); Mem. Op. and Order on Motion to Vacate (Bankr. Dkts. 4678, 4679); Order on Motion to Reconsider (Bankr. Dkt. 4689).

A. The approval and substitution orders assigned the reserved claims.

The Litigation Trustee brought this adversary proceeding on causes of action the Plan reserved. On June 30, 2025, the Bankruptcy Court approved the settlement assigning those claims to HMIT. Order Approving Settlement, Bankr. Dkt. 4297 ¶¶ 7, 11 (App. 1603–04). The Court found that the transferred claims are property of the estate, that the sale was a proper exercise of business judgment under 11 U.S.C. § 363(b), and that HMIT acquired them in good faith and is entitled to the protections of § 363(m). *Id*. ¶¶ 6–7, 13. Dugaboy objected, and Defendant James Dondero testified in opposition to the settlement, but their objections were overruled. *Id*. ¶ 10. Defendants are barred from relitigating HMIT's standing to assert these claims.

The assignment consisted of all claims and causes of action asserted, or that could have been asserted, by the Litigation Trustee in the Amended Complaint. Claims Assignment Agreement at 1, ¶ 1(a) (App. 1622). The Litigation Trustee assigned all its right, title, and interest in those claims. *Id*. HMIT accepted them. *Id*. ¶ 1(b). On September 5, 2025, the Bankruptcy Court substituted HMIT as plaintiff in place of the Litigation Trustee. Order Granting Motion to

Substitute, Adv. Dkt. 377 (App. 1615). Substitution under Rule 25(c) is designed for situations like this, "to allow the action to continue unabated when an interest in the lawsuit changes hands." *In re Covington Grain Co*., 638 F.2d 1362, 1364 (5th Cir. 1981). HMIT did not file a new case. It took over a case the Litigation Trustee previously filed.

Defendants' plan-modification argument fares no better. They contend that the Claimant Trust's October 2021 transfer of claims to the Litigation Sub-Trust modified the substantially consummated Plan. Doc. 69 at 28–30 (citing *U.S. Brass*, 301 F.3d at 307–09). But the Plan and the Claimant Trust Agreement authorized that transfer, Plan Art. IV.B.1, B.10 (App. 0539–40, 0544); Claimant Trust Agmt. § 2.3 (App. 0590–91), so it implemented the Plan rather than modified it. *U.S. Brass*, 301 F.3d at 308–09 (a modification alters rights not "specifically contemplated ... at confirmation"). The Bankruptcy Court also addressed the integrity of the Sub-Trust's title when it approved the sale, after notice to Dondero, Dugaboy, Strand, NexPoint, HCMFA, and the other Defendants. Order Approving Settlement ¶¶ 6–7, 10 (App. 1603–04). Once final, a bankruptcy court's order is "res judicata to the parties and those in privity with them," and it is not subject to collateral attack by those who had a fair opportunity to challenge it. *Travelers Indem. Co. v. Bailey*, 557 U.S. 137, 152 (2009). Defendants cannot relitigate in this Court whether the Sub-Trust had title to the claims it assigned to HMIT.[6] And § 363(m) protects the sale to HMIT as a good-faith purchaser in any event. 11 U.S.C. § 363(m).

[6] Defendants have taken the word "expedience" to a new level and given new meaning to the notion of disingenuousness. HMIT requests that the Court take judicial notice of positions that Dondero, Ellington, Leventon, and NexPoint—represented by Stinson LLP, which also signed the Motion here—have taken in related state-court litigation. First, they ask the state courts to enforce the settlement agreement the Bankruptcy Court approved, Bankr. Dkt. 4297, as a valid and unambiguous release that bars claims against a co-defendant "as a matter of law." Defs.' Reply Br. in Supp. of Mot. to Dismiss Under the TCPA at 25–27, 32, *CDMCFAD, LLC v. Dondero*, No. DC-25-21171 (134th Dist. Ct., Dallas Cnty., Tex. Apr. 13, 2026) ("TCPA Reply")(Hyperlink); Appellants' Reply Br. at 20–24, *Dondero v. CDMCFAD, LLC*, No. 05-26-00822-CV (Tex. App.—Dallas Oct. 16, 2026) ("App. Reply")(Hyperlink). Here, they dispute the title that the settlement agreement conveyed to HMIT. Second, they told the state courts that the Tall Pine allegations in this case describe "the same Tall Pine fraud," involving "surreptitious payments in exchange for no services," TCPA Reply at 7–8; App. Reply at 29, 31, while telling this Court that the same allegations concede "ordinary compensation promised by Highland," Doc. 69 at 57 n.24. Third, they told the state court that a

B. Defendants' other standing challenges also fail.

Defendants contend that all fiduciary-duty claims were "Reorganized Debtor Assets" that never reached the Litigation Sub-Trust. But the Plan provision they cite reaches only Causes of Action "that, for any reason, are not capable of being transferred to the Claimant Trust." Plan Art. I.B.115 (App. 0528). Its parenthetical, "including, without limitation, claims for breach of fiduciary duty," gives examples within that category; it does not place every fiduciary claim in it, and the Bankruptcy Court approved the assignment of the claim to the Litigation Sub-Trust.[7]

The Plan transferred the "Estate Claims" to the Litigation Sub-Trust, and those are "any and all estate claims and causes of action against Mr. Dondero, … other insiders of [Highland], and each of the Related Entities." SAC ¶ 25; Final Term Sheet, Bankr. Dkt. 354 (App. 0322). Estate Claims against Dondero and Strand necessarily include claims they breached the fiduciary duties owed Highland. Strand was Highland's general partner, and Dondero controlled Highland through Strand. SAC ¶¶ 12, 30. The estate's claims against them are claims that they breached duties they owed to Highland in those roles, and the Plan's Schedule of Causes of Action names both and reserves claims for "breach of fiduciary duties." Schedule of Causes of Action at 1 (App. 0401). Defendants' reading would strip the Sub-Trust of the claims it was created to prosecute.

Second, as if by sleight of hand, Defendants recharacterize Plaintiff's fiduciary duty claims against Ellington and Leventon as non-assignable malpractice claims with a shortened limitations period. Doc. 69 at 26–27. However, as shown in Part VII below, these claims do not sound in

---

fiduciary-duty claim against an attorney survives when it alleges "self-dealing or improper benefit by the attorney," TCPA Reply at 20, citing *Border Demolition & Envtl., Inc. v. Pineda*, 535 S.W.3d 140 (Tex. App.—El Paso 2017, no pet.), while Ellington and Leventon ask this Court to treat the SAC's self-dealing allegations as malpractice claims, Doc. 69 at 55–59, with no reference to *Pineda*. Fourth, they argued on appeal that unjust enrichment "requires no misrepresentation, no scienter, and no reliance," App. Reply at 28, while faulting HMIT's unjust-enrichment counts here for not identifying "which specific transactions constituted the fraud," Doc. 69 at 63.

[7] A fiduciary duty is a "broad and unyielding" duty of loyalty, defined as a "mandate that the best interest of the corporation take precedence over any interest possessed by" the fiduciary. *Cede & Co. v. Technicolor, Inc.*, 634 A.2d 345, 361, 367-68 (Del. 1993). If a fiduciary engages in self-dealing, Delaware law will not allow him to "profit personally from his [disloyal] conduct…" *Thorpe by Castleman v. CERBCO, Inc.*, 676 A.2d 436, 445 (Del. 1996).

negligence. There is an obvious distinction between a knowing participation in a knowing scheme to divert business opportunities and cash, on the one hand, and a failure to satisfy a professional standard of care, on the other. The case against Ellington and Leventon is not about negligence; it is about self-dealing and the improper benefits they obtained.

Third, Defendants contend that Leventon was not an officer or an "insider" or a "Related Entity." Doc. 69 at 28–29. But the Plan's definition of Related Entities includes "any entity or person that is an insider of the Debtor under section 101(31) of the Bankruptcy Code." Final Term Sheet Ex. D (App. 0370); Doc. 69 at 28–29 n.11. Section 101(31) provides that the term insider "includes" the persons it lists, and the word "includes" is not a term of limitation. 11 U.S.C. §§ 101(31), 102(3). Courts recognize "non-statutory insiders"–persons whose relationship with the debtor is close enough that their dealings with it were not conducted at arm's length. *U.S. Bank N.A. v. Vill. at Lakeridge, LLC*, 583 U.S. 387, 390–91 (2018); *Browning Interests v. Allison (In re Holloway)*, 955 F.2d 1008, 1010–11 (5th Cir. 1992). Defendants' Motion does not address non-statutory insider status at all, but the SAC does. Whether Leventon was a non-statutory insider is also a fact-intensive question, *see Vill. at Lakeridge*, 583 U.S. at 394–96, and it cannot be resolved via a Rule 12(b)(6) proceeding.

Leventon was Highland's Assistant General Counsel from 2011 until he was terminated for cause in January 2021 "for acting in a manner adverse to HCMLP's interests." SAC ¶ 19. He was one of the "loyalists" to whom Dondero "delegated authority ... irrespective of their titles or roles," and Leventon testified that Highland, then controlled by Dondero, could have him perform services for any of the 2,000 entities Dondero also controlled. *Id.* ¶ 111. Leventon was "directly involved in the transfers to Sentinel," an entity Dondero and Ellington owned, and then delivered an "intentionally misleading" presentation to the Independent Board that omitted those transfers. *Id.* ¶¶ 66–67 & n.17, 186–87. He also signed the certificate forming Massand Capital, LLC, the

recipient of the Massand Transfers. *Id.* ¶ 20. He helped draft and execute the agreement that moved a $9.5 million receivable out of Acis ten days after an adverse arbitration award, *id.* ¶ 192, and he made affirmative misrepresentations to the Redeemer Committee, *id.* ¶ 79. After the Petition Date, Dondero arranged undisclosed payments to Leventon through Tall Pine. *Id.* ¶ 153. These allegations, taken as true, describe a relationship that was not arm's length. In any event, whatever Leventon's insider status, the Plan reserved claims against him. The Schedule of Causes of Action reserves claims against "any current or former employee of the Debtor," Schedule of Causes of Action at 1 (App. 0401), and Leventon was Highland's Assistant General Counsel from 2011 until January 2021. SAC ¶ 19. Those reserved claims were Claimant Trust Assets that the Plan and the Claimant Trust Agreement authorized the Claimant Trust to transfer to the Litigation Sub-Trust. *See* Plan Art. IV.B.1, B.10 (App. 0539–40, 0544); Claimant Trust Agmt. § 2.3 (App. 0590–91).

Article III standing is separately satisfied. An assignee of a claim has standing to sue because it stands in the assignor's shoes. *Sprint Commc'ns Co. v. APCC Servs., Inc*., 554 U.S. 269, 284–85 (2008); *see Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–61 (1992). As assignee, HMIT is suing on claims arising from Defendants' pre-petition diversion of Highland's assets. SAC ¶¶ 26–27. The Litigation Sub-Trust stood in the shoes of Highland and HMIT has the right to stand in the shoes of the Litigation Sub-Trust. Morever, whether a particular claim belonged to the Litigation Sub-Trust, the Claimant Trust, or the Reorganized Debtor goes to the merits of HMIT's right to relief, not the Court's power to hear the case. *See Lexmark Int'l, Inc. v. Static Control Components, Inc*., 572 U.S. 118, 128 n.4 (2014).

C. The Plan reserved the claims Defendants say were not retained.

Defendants argue that four groups of counts were not reserved: the DRULPA illegal-distribution claim, the money-had-and-received counts, the aiding-and-abetting counts, and the conspiracy count. Doc. 69 at 30–31. They rely on *Dynasty Oil & Gas, LLC v. Citizens Bank (In re*

United Operating, LLC), 540 F.3d 351 (5th Cir. 2008). A plan must expressly retain the claims, and the reservation must be specific and unequivocal. *Id*. at 355. Here, the reservation language in the Plan is more than enough.

The Plan defines "Causes of Action" to include claims under chapter 5, claims under state law, fraudulent-transfer claims, and claims assertable under alter-ego theories. Plan Art. I.B.19 (App. 0518). It then incorporates "the Causes of Action belonging to the Debtor's Estate listed on the schedule of Causes of Action." *Id*. Article IX.E preserves every Cause of Action not expressly released, and it preserves the right to pursue claims in any pending lawsuit. Plan Art. IX.E.1–.2 (App. 0563–64).

- The schedule does precisely what *United Operating* requires–it reserves causes of action by category, by defendant, and by transaction. Schedule of Causes of Action at 1 (App. 0401). The categories include breach of fiduciary duties, unjust enrichment, "claims for recovery of distributions or dividends," avoidance actions under sections 544 and 547, "claims brought under state law," "claims under any common-law theory of tort or law or equity," and "any claims similar in nature to the foregoing." *Id*.
- The defendants expressly include James Dondero, the Dugaboy Investment Trust, NexPoint Advisors, L.P., Highland Capital Management Fund Advisors, L.P., Strand Advisors, and "any current or former insider" or "any current or former employee" of the Debtor. *Id*. The transactions include "the distribution of assets or cash from the Debtor to partners of the Debtor." *Id*.
- Money had and received is also pleaded as unjust enrichment, which the schedule identifies. SAC Counts XXIII–XXV ("Unjust Enrichment or Money Had and Received").
- The DRULPA count is a claim for recovery of improper distributions, which the schedule names, arising from distributions to partners, which the schedule names. SAC Count III.
- Aiding and abetting and conspiracy are the common-law theories that travel with the breach-of-fiduciary-duty claims the schedule names. SAC Counts XV, XVI, XXX, XXXI.

To be clear, *United Operating* does not require a plan to use the caption of each count in a complaint filed years later. A reservation that states the basis of the claims and identifies the prospective defendants is sufficient because it is specific and unequivocal. *Spicer v. Laguna Madre*

Oil & Gas II, L.L.C. (In re Texas Wyoming Drilling, Inc.), 647 F.3d 547, 551–52 (5th Cir. 2011) (a reservation that identified the basis of the claims and the prospective defendants was specific and unequivocal, and was "far more specific" than the blanket reservation rejected in *United Operating*); *accord Compton v. Anderson (In re MPF Holdings US LLC)*, 701 F.3d 449, 456–57 (5th Cir. 2012) (reservation sufficient where plan exhibits identified each prospective defendant). The schedule here does both.

Notably, Defendants' reservation argument does not reach the Chapter 5 claims. The schedule lists avoidance actions under sections 544 and 547, and Article I.B.19 includes any claim under chapter 5. Defendants do not contend otherwise.

D. HMIT is the real party in interest.

HMIT holds all right, title, and interest in the assigned claims, and the Bankruptcy Court approved the assignment and substituted HMIT as plaintiff. Claims Assignment Agreement ¶ 1(a)–(b) (App. 1622); Order Approving Settlement, Bankr. Dkt. 4297 ¶ 11 (App. 1604); Order Granting Motion to Substitute, Adv. Dkt. 377 (App. 1615). The action is therefore properly prosecuted in HMIT's name as the real party in interest. FED. R. CIV. P. 17(a)(1), 25(c); *In re Covington Grain Co.*, 638 F.2d at 1364. Defendants argue that HMIT is a purchaser, not the Trustee, and that it did not assume the Trustee's duties. Doc. 69 at 8–9, 15. But even a third-party purchaser of an estate claim may pursue it for its own account. *In re South Coast Supply Co.*, 91 F.4th at 385.

IV. DEFENDANTS' ARGUMENTS THAT PLAINTIFF'S CLAIMS ARE TIME-BARRED ARE FLAT WRONG

Defendants' next arguments focus on limitations and repose, Doc. 69 at 35–43, and fare no better. Indeed, their own demonstrative tables concede that substantial claims fall within the limitations periods they invoke, including the $2.98 million Grey Royale diversion and the 2017 Sentinel, Acis, and HarbourVest liabilities, and their requests for complete dismissal of particular

counts are contradictory.[8] Moreover, the Bankruptcy Code's lookback periods reach the transfers pleaded under §§ 547 and 548. The "lifeboat" claims also rest on separate events and transfers that continued through the Petition Date. Lastly, the SAC pleads facts supporting the discovery rule and tolling based on concealment, and it identifies actual creditors under § 544(b), including the IRS, whose rights extend the lookback period. *See* Parts IV.D–E. At a minimum, these allegations preclude resolving the limitations questions against HMIT on the pleadings.

A. Defendants' demonstrative tables attached to their Motion contradict their requests for dismissal.

Defendants do not contend that limitations bars the SAC in its entirety. They ask the Court to dismiss claims "to the extent they rest on conduct occurring before" their suggested cutoff dates. Doc. 69 at 37; *see id*. at 35 (claims "may be dismissed in part"). The demonstrative tables annexed to their Motion confirm that significant claims fall inside the very periods Defendants invoke:

- ***The Grey Royale escrow transfer***. Defendants concede that claims arising from the "approximately $2.98 million" June 4, 2018 escrow transfer survive the four-year period on Count XIV against Dondero and Strand. They also concede that those claims survive the two-year period on Count XIV against Ellington, on Count XVI (conspiracy), and on Counts XXIII and XXIV (unjust enrichment and money had and received) against Dondero, Ellington, and Leventon. Doc. 69 at 75–76 (Tables A, B).
- **The Count V liabilities.** Defendants concede that, as to Dondero and Strand, claims arising from the 2017 Sentinel transaction and the 2017 Acis and HarbourVest liabilities "survive[] TX 4-year SOL." Id. at 75 (Table A).
- ***The 2016–2019 distributions***. Defendants concede that the distributions to Dugaboy and Strand from December 19, 2016 through March 28, 2019 "survive TUFTA 4-year statute of repose" on Counts I and II, and that those after October 16, 2017 fall within § 548's two-year lookback. *Id*. at 77 (Table C). Because Counts I and II also seek recovery from Dondero, Dugaboy's primary beneficiary and Strand's sole owner, as the person for whose benefit those distributions were made, the same concession defeats dismissal of those counts as to him. 11 U.S.C. § 550(a)(1); SAC ¶¶ 15, 30, 156, 160.
- ***The Massand Transfers.*** Defendants' tables treat the Massand claims as time-barred because the Massand Consulting Agreements were signed in 2014 and 2015. Doc. 69

[8] HMIT points to Defendants' demonstrative tables only to show their inconsistencies and concessions, not to adopt their reasoning or analysis, which HMIT specifically disputes. For the reasons discussed herein, each of Plaintiff's claims is timely.

> at 75 (Table A, Counts XIV, XV, XVI); *id.* at xv (Counts XX–XXI). But Counts XX and XXI challenge the payments, not the agreements: thirty-two monthly payments from January 3, 2017 through August 1, 2019, totaling $1,742,082. SAC ¶¶ 294, 302. Each payment was a separate transfer and a separate breach. TEX. BUS. & COM. CODE § 24.010(a); *Barker v. Eckman*, 213 S.W.3d 306, 311 (Tex. 2006). Every one was made after October 16, 2015, within both TUFTA's four-year period and the four-year period for fiduciary-duty claims. Defendants' request to dismiss Counts XX and XXI as extinguished by TUFTA's repose period, Doc. 69 at xv, is refuted by the face of the SAC, as is Table A's treatment of the Massand portions of Counts XIV, XV, and XVI.

These concessions cabin Defendants' limitations argument to particular, but not all, transactions within Counts I, II, V, XIV, XVI, XXIII, and XXIV.

Defendants ask the Court to dismiss Counts V, XIV, XVI, XXX, and XXXI "entirely" as to Ellington and Leventon. *Id*. at 37. Yet they concede that the Grey Royale claims against Ellington survive the two-year period on Count XIV, that the Grey Royale claims survive on Count XVI, and that the Grey Royale claims "against Ellington and Leventon" survive on Count XXIV. *Id*. at 75–76. The conduct underlying Counts V and XXX also falls inside two years: beginning October 24, 2017, four days after the Acis arbitration award, when Ellington and Leventon implemented transactions that stripped Acis of its assets. SAC ¶¶ 191–92. And Count XXXI against Ellington reaches the June 2018 Grey Royale diversion and the 2017–2019 Massand payments. *Id*. ¶¶ 147, 258, 302. Even indulging Defendants' flawed theory of professional malpractice, which is subject to a two-year period, these counts cannot be dismissed. See Part VII.

Defendants acknowledge that aiding-and-abetting and conspiracy claims "relying on the breach of fiduciary duty claims" carry the same four-year limitations period as the underlying fiduciary claims. *Id*. at 36 (citing *Nguyen v. Watts*, 605 S.W.3d 761, 792–93 (Tex. App.—Houston [1st Dist.] 2020, pet. denied)); *see Agar Corp. v. Electro Circuits Int'l, LLC*, 580 S.W.3d 136, 142 (Tex. 2019) (conspiracy takes the limitations period of the underlying tort). Table A nonetheless applies a two-year period to Count XVI, the conspiracy count, against every defendant named in it, including Dondero, NexPoint, HCMFA, and Get Good Trust, none of whom is alleged to be a

lawyer. Doc. 69 at 75. By Defendants' own rule, the four-year period governs Count XVI, and every portion of that count arising after October 16, 2015 is timely. Defendants' Motion is also internally inconsistent. Their arguments and tables measure the fiduciary-duty claims from October 16, 2015, *id*. at 36–37, 74–75, yet their conclusion asks the Court to dismiss the claims against Dondero arising before October 16, 2016. *Id*. at 43.

B. This action was timely commenced, and the Bankruptcy Code fixes the relevant lookback periods.

Highland filed its voluntary petition on October 16, 2019. SAC ¶ 12; 11 U.S.C. § 301(b). Two provisions of the Code govern the timing of the estate's claims. For the avoidance claims, § 546(a)(1)(A) allowed an action under §§ 544, 547, and 548 to be commenced within two years after the order for relief. For the estate's other claims, § 108(a) preserved any claim whose limitations period "ha[d] not expired before the date of the filing of the petition," and allowed the trustee to commence it until the later of the end of that period or "2 years after the order for relief." 11 U.S.C. § 108(a). ***The Litigation Trustee timely commenced this proceeding on October 15, 2021, within both periods***. Original Complaint, Adv. Dkt. 1 (App. 0761–894). The relevant question for each claim is therefore whether it remained open on October 16, 2019. Defendants agree this is the test. Doc. 69 at 36. Measured from that date, the Code's own lookback periods apply independently of any state-law period:

- *Section 548.* A transfer made "on or within 2 years before the date of the filing of the petition" may be avoided. 11 U.S.C. § 548(a)(1). Therefore, every transfer pleaded under § 548 that was made on or after October 16, 2017 is timely, including the distributions to Dugaboy and Strand after that date, which Defendants concede fall within the lookback. Doc. 69 at 77 (Table C) (distributions "partially barred by § 548 2-year SOL"); SAC ¶¶ 135–138, 156, 163. And it also includes the expense transfers alleged in Counts XXVIII and XXIX that all fall between October 31, 2018 and October 15, 2019, well inside two years. SAC ¶ 346.
- *Section 544(b).* Section 544(b) incorporates the period available to the actual creditor under applicable law, measured to the Petition Date. For claims under TUFTA, that period reaches transfers made on or after October 16, 2015. TEX. BUS. & COM. CODE § 24.010(a). Defendants agree. Doc. 69 at 40. Whether the § 544(b) claims reach further,

through TUFTA's discovery provision or through a creditor not subject to the state limitations period, is addressed below.

- *Section 547.* The preference claim challenges $4,753,911 in transfers to Dondero and $318,893 to Ellington, both insiders, made between October 31, 2018 and October 15, 2019, all within one year before the Petition Date. SAC ¶¶ 345–346; 11 U.S.C. § 547(b)(4)(B). Defendants do not challenge Count XXVII on limitations grounds. See Doc. 69 at 68–69; *id*. at xv.

The TUFTA repose provision governs a claim brought under TUFTA. TEX. BUS. & COM. CODE § 24.010(a). It does not shorten the two-year period that Congress established in § 548, and it has no bearing on § 547. A transfer within § 548's lookback is not extinguished because the same transfer is also challenged under § 544(b) and TUFTA.

C. The "lifeboat" claims rest on separately accruing conduct, not on two dates in 2011 and 2012.

Defendants seek complete dismissal of the counts arising from the "lifeboat" scheme: Counts XII and XIII (fraudulent transfer), Count XVII (tortious interference), and Count XXV (unjust enrichment and money had and received). They also seek dismissal of the "lifeboat" portions of Counts IV, XV, and XVI. Doc. 69 at 74–77 (Tables A–C). Their tables date all of those claims to two events: the December 15, 2011 HCMFA novation and the June 13, 2012 NexPoint advisory transfer. *Id.* That treats the "lifeboat" scheme as if it started and ended in 2012, but the SAC alleges something different.

When a plaintiff alleges a series of wrongful acts, a cause of action accrues "immediately upon the occurrence of each breach," and limitations runs separately for each. *Barker*, 213 S.W.3d at 311; Doc. 69 at 35–36. The same is true of fraudulent transfers. Each transfer is measured from the date it "was made." TEX. BUS. & COM. CODE § 24.010(a); *Life Partners*, 926 F.3d at 121 (applying the cutoff transfer by transfer).

Here, the SAC alleges that the "lifeboat" scheme involved a series of separate transactions that continued long after 2012, "including but not limited to funneling new business to the

'lifeboat' entities and undercompensating HCMLP for the use of its employees—continued through the Petition Date." SAC ¶ 178; *see id*. ¶ 272(a) (Defendants "generat[ed] new business through NexPoint and HCMFA" and "fail[ed] to compensate HCMLP for the use of its employees and resources"). New business was steered to NexPoint, not HCMLP, throughout the four years before the Petition Date. From 2015 to 2019, NexPoint's assets under management grew from $936 million to $4.8 billion, while HCMLP's fell from $9.5 billion to $2.3 billion. *Id*. ¶ 49. HCMLP's employees continued to perform HCMFA's advisory work without a sub-advisory agreement, and it was only in May 2018 that HCMFA agreed to reimburse even part of HCMLP's payroll cost. *Id*. ¶ 52.

Each of these acts is properly viewed as an independent breach, interference, or receipt of benefit, and each triggers its own unique limitations period. *Barker*, 213 S.W.3d at 311. *Exxon Mobil Corp. v. Rincones*, 520 S.W.3d 572, 591 (Tex. 2017), on which Defendants rely, Doc. 69 at 38, is not to the contrary. *Rincones* holds that a continuing injury from a single wrongful act does not restart limitations on that act, but it does not hold that a new wrongful act is barred because an earlier one was. The SAC alleges distinct acts: new business diverted to the "lifeboats" and new services taken from Highland without compensation. These are not the lingering effects of the initial 2011 and 2012 defalcations because they are each new torts.

The "lifeboat" claims under Counts IV, XV, XVI, XVII, and XXV cannot be dismissed. They survive as to conduct on or after October 16, 2015 for the fiduciary-duty, aiding-and-abetting, and conspiracy counts, and on or after October 16, 2017 for Counts XVII and XXV. Earlier conduct is preserved by the tolling the SAC pleads. *See* Part IV.D; *Janvey v. Suarez*, 978 F. Supp. 2d 685, 708–09 (N.D. Tex. 2013) (receiver's unjust-enrichment claim tolled where defendant's domination and control prevented discovery until the receivership). Counts XII and XIII stand differently. They also challenge the 2011 and 2012 transfers of the management contracts

themselves, SAC ¶¶ 245, 248, 251, 253, but they also survive because their timeliness turns on the actual-creditor analysis discussed below.

D. Limitations cannot be resolved against HMIT because the SAC pleads tolling.

Limitations is an affirmative defense. It supports dismissal under Rule 12(b)(6) only "where it is evident from the plaintiff's pleadings that the action is barred and the pleadings fail to raise some basis for tolling or the like." *Jones v. Alcoa, Inc*., 339 F.3d 359, 366 (5th Cir. 2003); Doc. 69 at 35, 42. Here, however, the SAC plausibly alleges merits-based tolling and Defendants' contrary arguments improperly depend on facts outside the pleadings.

1. The fiduciary duty claims were inherently undiscoverable while Dondero controlled Highland.

Texas law treats injuries caused by a fiduciary as inherently undiscoverable. Because a fiduciary is presumed to possess superior knowledge, and the beneficiary is entitled to rely on the fiduciary's candor, "the nature of the injury" in such cases "is presumed to be inherently undiscoverable." *S.V. v. R.V*., 933 S.W.2d 1, 8 (Tex. 1996); *see Willis v. Maverick*, 760 S.W.2d 642, 645–46 (Tex. 1988) (applying the discovery rule because of the fiduciary relationship). *Willis* is Defendants' own authority. Doc. 69 at 37. A fiduciary's concealment independently tolls limitations until the wrong is, or reasonably should have been, discovered. *Borderlon v. Peck*, 661 S.W.2d 907, 908–09 (Tex. 1983). When a plaintiff knew or should have known of its injury is ordinarily a fact question. *Childs v. Haussecker*, 974 S.W.2d 31, 44 (Tex. 1998).

The SAC alleges that Dondero "exercised complete control over HCMLP from its founding until January 9, 2020," when he was ousted and the Bankruptcy Court installed an independent board. SAC ¶ 30; *see id*. ¶ 12. Until then, Dondero was HCMLP's "solitary decision-maker on all matters concerning the company's operation and management." *Id.* ¶ 30. Thus, the claims were "inherently undiscoverable because of Dondero's complete domination and control over HCMLP

and the Dondero Entities, including … the complexity and opacity of the corporate structure he created." *Id*. ¶¶ 175, 183, 266, 269. And the SAC also alleges specific concealment:

- Ellington told HCMLP's Tax Director in September 2019 that the $2.98 million diverted to Grey Royale represented "closing costs" and "legal expenses." *Id*. ¶¶ 147–148.
- After the Petition Date, Dondero, Ellington, and Leventon "actively concealed" the 2017 Sentinel transfer "from the Independent Board, UBS, and the Bankruptcy Court." *Id*. ¶ 187.

2. Highland's "knowledge" was the wrongdoers' knowledge, which is not imputed to Highland.

Defendants confound the issue by arguing that the relevant knowledge is Highland's, not the Litigation Trustee's. Doc. 69 at 42 (citing *In re Segerstrom*, 247 F.3d 218, 224 (5th Cir. 2001)). HMIT agrees that it stands in Highland's shoes. But Highland's shoes include the tolling Highland itself would have had. An entity acts and acquires knowledge only through its agents. When those agents are the wrongdoers, acting against the entity, their knowledge is not imputed to it, and limitations does not run while they remain in control. *See FDIC v. Shrader & York*, 991 F.2d 216, 223–24 (5th Cir. 1993) (no imputation where the agent "secretly is acting adversely to the principal and entirely for his own or another's purposes," as where an officer gives an entity in which he has an interest "a concession to which it is not entitled"); *see id*. at 227 (declining to extend tolling to outside counsel because the FDIC did not allege it "committed intentional torts, or conspired with" the insider); *FDIC v. Dawson*, 4 F.3d 1303, 1309–12 (5th Cir. 1993) (predicting that Texas would toll limitations under the doctrine of adverse domination where culpable insiders controlled the entity). Here, the person who would have had to discover the claims and cause Highland to sue Dondero was Dondero himself, and this demonstrates the ludicrous nature of the Defendants' argument. SAC ¶¶ 12, 30. Highland could not have been on notice of claims against Dondero while Dondero was controlling Highland. *Segerstrom* is not to the contrary. It holds that a trustee takes

the debtor's claims subject to the debtor's defenses, 247 F.3d at 224, not that a debtor controlled by the defendant is charged with notice of the defendant's concealed wrongs.

3. Defendants' public-records argument raises fact questions the Court cannot resolve on a motion to dismiss.

Defendants contend that Highland and its creditors were on inquiry notice from lawsuits filed by UBS in 2009, the Redeemer Committee in 2010, and Daugherty in 2017, and from SEC filings describing NexPoint as Highland's affiliate. Doc. 69 at 43 & nn.19–20. This argument also fails for several reasons:

- Judicial notice establishes the existence of public filings, not the truth of their contents or what a reasonable person would have inferred from them. *Taylor*, 162 F.3d at 830–31. That is a fact issue that cannot be resolved in a 12(b)(6) proceeding.
- The filings concern different conduct. Litigation over Highland's management of the Crusader funds, its 2008 dealings with UBS, or Daugherty's compensation says nothing about the 2016–2019 distributions, the 2018 Grey Royale diversion, the Massand Transfers, or the undercompensation of Highland under the "lifeboat" arrangements.
- A disclosure of affiliation is not a disclosure of a breach. An SEC filing stating that Highland "makes available to [NexPoint] experienced investment professionals and other resources," Doc. 69 at 43 n.20, discloses an affiliation. It does not disclose that Highland was being undercompensated for those resources. SAC ¶¶ 43, 52.
- Notice to creditors is not notice to Highland. For the debtor-owned claims, notice to outside creditors is not notice to Highland, whose only decision-maker was the defendant. *Id*. ¶ 30.

In any event, and at most, whether any of these materials triggered inquiry notice, and when, is a question of fact, and is not appropriate in this Rule 12(b)(6) proceeding. *Childs*, 974 S.W.2d at 44.

4. TUFTA's discovery provision preserves the actual-fraud claims.

For the intentional fraudulent-transfer claims, TUFTA extends the period to "one year after the transfer … was or could reasonably have been discovered by the claimant." TEX. BUS. & COM. CODE § 24.010(a)(1). That period runs not from discovery of the transfer alone, but from when "the fraudulent nature of the transfer is discovered or reasonably could have been discovered," and when that occurred "is generally a question of fact." *Janvey v. Democratic Senatorial Campaign*

Comm., Inc., 712 F.3d 185, 195–96 (5th Cir. 2013). The SAC alleges substantive facts showing that the transfers were structured so creditors could not discover them, and that Dondero and his lieutenants concealed their conduct from the creditors on whose rights HMIT relies. *See* SAC ¶¶ 65–68, 79, 110, 113, 165(c), 175, 187.

The lack of discoverability relates to transfers made before October 16, 2015: the 2010–2013 distributions challenged in Count II, SAC ¶ 163, the 2011 and 2012 transfers of the management contracts challenged in Count XIII, *id.* ¶¶ 251, 253, and the 2014 and 2015 Massand obligations challenged in Count XIX, *id.* ¶ 289. Doc. 69 at 41–43. The Massand payments challenged in Count XXI were made after that date and need no tolling. *See* Part IV.A. For the earlier transfers, the SAC alleges two reasons creditors could not reasonably have discovered them.

First, the SAC alleges a pattern of concealment directed at creditors. HMIT relies on UBS and the Redeemer Committee, among others, as creditors who could have avoided the transfers. SAC ¶¶ 27, 155, 162. The SAC alleges that Dondero, Ellington, and Leventon actively deceived both:

- *UBS.* They caused Highland "to misrepresent to UBS that the Fund Counterparties had no assets," concealed the 2017 Sentinel transfer, and continued that concealment after the Petition Date. UBS learned the truth only when the Independent Board discovered and disclosed it. *Id*. ¶¶ 65–68, 88–89, 187.
- *The Redeemer Committee.* Leventon "made affirmative misrepresentations to the Redeemer Committee to disguise" Highland's purchases of Crusader claims, *id.* ¶ 79, and Dondero, Ellington, and Leventon caused Highland to "surreptitiously transfer approximately $32 million" from the Crusader Funds in 2016, *id.* ¶ 81.

Creditors whom Defendants were affirmatively misleading cannot be charged, on the pleadings, with having discovered Defendants' other transfers.

Second, the transfers at issue were made within an opaque web of entities Dondero alone controlled. Dondero was Highland's "solitary decision-maker." *Id*. ¶ 30. He signed intercompany agreements on both sides of deals, *id*. ¶ 110, and caused Highland to make the challenged transfers

as "part of a multi-faceted scheme to remove assets from HCMLP and conceal them from HCMLP's creditors," *id.* ¶¶ 165(c), 290, 303(c), 360. "[T]he complexity and opacity of the corporate structure he created" kept the transfers from view. *Id.* ¶¶ 175, 183, 266, 269. Whether UBS or the Redeemer Committee, creditors whom Defendants were affirmatively misleading during the same period, SAC ¶¶ 65–68, 79, 187, reasonably could have discovered those transfers, and when, is a question of fact that cannot be resolved on the pleadings.

5. At a minimum, the Court should grant leave to amend.

If the Court concludes that any tolling allegation is insufficiently specific, the appropriate course is leave to amend, not dismissal with prejudice. FED. R. CIV. P. 15(a)(2); *Great Plains Tr. Co. v. Morgan Stanley Dean Witter & Co.*, 313 F.3d 305, 329 (5th Cir. 2002).

E. The SAC identifies actual creditors who could have avoided the transfers, and the IRS's rights reach the earlier transfers.

Section 544(b)(1) permits the avoidance of a transfer "that is voidable under applicable law by a creditor holding an unsecured claim that is allowable under section 502." 11 U.S.C. § 544(b)(1). The trustee steps into the shoes of an actual creditor and takes that creditor's avoidance rights. *United States v. Miller*, 604 U.S. 518, 524 (2025). Defendants argue that the SAC identifies no creditor who could have avoided each transfer, Doc. 69 at 39–40, but they are wrong.

1. UBS, the Redeemer Committee, Daugherty, and Acis could have avoided every transfer made on or after October 16, 2015.

The SAC alleges that UBS, the Redeemer Committee, Patrick Daugherty, and Acis each "held an allowable claim" on the Petition Date and "could have sought under state law to avoid the transfers made on or after October 16, 2015." SAC ¶¶ 27, 155, 162. These are not abstractions: UBS's claim was later allowed at $125 million, the Redeemer Committee's at $136,696,610, and Acis's at $23 million. *Id.* ¶¶ 9, 87–91. TUFTA defines a "claim" as a "right to payment or property, whether or not the right is reduced to judgment, liquidated, unliquidated, fixed, contingent,

matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured." TEX. BUS. & COM. CODE § 24.002(3). And each claim arose long before the 2015–2019 transfers. UBS sued Highland on February 24, 2009, over conduct in 2008; the Redeemer Committee's claims arose from Highland's management of the Crusader Funds beginning in 2008, the 2011 Joint Plan and Scheme (SAC ¶¶ 76-81), and the misconduct from 2013 through 2016 that produced the arbitration award; and Daugherty's claims arose from disputes dating to his departure from Highland. SAC ¶¶ 33–34, 70–74, 76–81; *see* Doc. 69 at 43 n.19 (acknowledging the UBS and Daugherty litigation).

As creditors whose claims arose before the transfers, these creditors could avoid transfers made with actual intent to defraud, transfers made without reasonably equivalent value while Highland was insolvent or undercapitalized, and transfers made to insiders. TEX. BUS. & COM. CODE §§ 24.005(a), 24.006(a)–(b). The *Miller* case, upon which Defendants rely, does not require more. Its statement that § 544(b) gives the trustee "no greater rights of avoidance than the actual creditor," 604 U.S. at 524, describes the derivative nature of the right. It imposes no pleading requirement beyond identifying an actual creditor who could have avoided the transfer, and the SAC does that. At a minimum, these allegations sustain the § 544(b) claims for every transfer made on or after October 16, 2015.

Counts XVIII and XIX stand on different footing. Those counts seek to avoid the obligations Highland incurred under the Massand Consulting Agreements of January 1, 2014 and January 5, 2015, and they are asserted only against Massand Capital, Inc. and Massand Capital, LLC. SAC ¶¶ 20, 283, 289. Massand Capital has appeared in this action but has not joined the present Motion. *Id*. ¶ 20; Doc. 69 at 1. The moving Defendants do not identify any claim asserted against them in Counts XVIII or XIX, nor do they explain any basis on which they are entitled to obtain dismissal of claims that seek no relief from them. The Court should therefore decline to

reach Counts XVIII and XIX. If the Court nevertheless considers them, the actual-creditor and discovery arguments addressed in this Part apply equally to those counts, and the Massand payments themselves—which Counts XX and XXI also challenge—are timely in any event. *See* Part IV.A.

2. The IRS was an actual creditor

The SAC separately alleges that the IRS held an allowable unsecured claim on the Petition Date, and that the IRS could have avoided the challenged transfers. SAC ¶¶ 27, 155, 162, 244, 251. The IRS filed an amended proof of claim on October 6, 2021, asserting unsecured claims "including for the tax period of June 30, 2015." *Id.* ¶ 27; *see* App. 1512. When the United States sues to collect a tax debt, it is not bound by state limitations periods. *United States v. Summerlin*, 310 U.S. 414, 416 (1940). It may collect within ten years after assessment. 26 U.S.C. § 6502(a)(1). These rights also inure to the benefit of a trustee who steps into the IRS's shoes under § 544(b), which permits avoidance of any transfer voidable by "a creditor holding an unsecured claim." It does not exclude governmental creditors or limit the trustee to creditors bound by state limitations periods. Most courts to consider the question have so held. *In re Kipnis*, 555 B.R. 877, 881–82 (Bankr. S.D. Fla. 2016); *Ebner v. Kaiser (In re Kaiser)*, 525 B.R. 697, 711–13 (Bankr. N.D. Ill. 2014); *Hillen v. City of Many Trees, LLC (In re CVAH, Inc.)*, 570 B.R. 816, 834–36 (Bankr. D. Idaho 2017); *In re Tops Holding II Corp.*, 646 B.R. 617, 651–54 (Bankr. S.D.N.Y. 2022). *Miller*'s principle cuts the same way: if the trustee takes "no greater rights" than the actual creditor, it also takes no fewer. 604 U.S. at 524.

Defendants rely on *In re Vaughan Co., Realtors*, 498 B.R. 297 (Bankr. D.N.M. 2013), the leading contrary decision. Doc. 69 at 40–41. But later courts repeatedly rejected *Vaughan*. *Kipnis*, 555 B.R. at 881–82; *Kaiser*, 525 B.R. at 711–13; *CVAH*, 570 B.R. at 835–36. Defendants' Fifth Circuit authorities also do not adopt *Vaughan*:

- *Mirant* held that the FDCPA is not "applicable law" under § 544(b) only because that statute's own text preserves title 11. *In re Mirant Corp.*, 675 F.3d 530, 535–36 (5th Cir. 2012) (citing 28 U.S.C. § 3003(c)). Section 6502 contains no such clause.
- *Moore* involved only a state-law creditor. *Moore*, 608 F.3d at 260.

Nor does HMIT's status as assignee change the analysis. Doc. 69 at 41. The § 544(b) right belonged to the estate. The Litigation Trustee held it under the Plan, and HMIT acquired it by an assignment the Bankruptcy Court approved. SAC ¶¶ 26–27. The right remains the same in HMIT's hands. *See In re South Coast Supply Co.*, 91 F.4th at 385 (whether the purchaser of an estate avoidance claim is a "representative of the estate" is "irrelevant").

3. Defendants' remaining objections raise questions of fact.

Defendants' two remaining points do not support dismissal. The analysis follows.

Allowance. Defendants argue that the stipulation resolving the IRS's claims does not show an allowed claim. Doc. 69 at 41 n.18. But § 544(b) does not require an allowed claim. It requires a creditor "holding an unsecured claim that is allowable under section 502." 11 U.S.C. § 544(b)(1). The question is whether, on the Petition Date, the IRS held an unsecured claim that could be allowed, and the SAC alleges that it did. SAC ¶¶ 27, 155, 162, 244, 251. Defendants do not contend that any IRS claim was disallowed under § 502(b). The later resolution of the IRS's claims by agreement says nothing about whether they were allowable when the petition was filed.

Timing. Defendants say that the IRS cannot avoid transfers made before its tax claim arose. Doc. 69 at 41 (citing *In re Taylor, Bean & Whitaker Mortg. Corp.*, 2018 WL 6721987, at *6 (Bankr. M.D. Fla. Sept. 28, 2018)). But TUFTA protects future creditors as well as existing ones: a transfer made with actual intent to defraud, or without reasonably equivalent value by a debtor that was undercapitalized or expected to incur debts beyond its ability to pay, is voidable by a creditor "whether the creditor's claim arose before or within a reasonable time after the transfer was made." TEX. BUS. & COM. CODE § 24.005(a). Nor does the IRS's claim arise only upon

assessment; the IRS holds a "right to payment" before assessment, so "the assessment date is an inappropriate measure for when a claim arises." *CVAH*, 570 B.R. at 841. Here, the SAC alleges that the IRS's claim arose within a reasonable time after the earlier transfers, SAC ¶ 27, and that Highland was insolvent throughout the period, *id*. ¶¶ 94–98. What counts as a reasonable time depends on the circumstances and, once again, this determination cannot be resolved on a motion to dismiss. Nor is the absence of a pleaded assessment date, Doc. 69 at 41, a basis for dismissal because the SAC alleges that the IRS held an allowable unsecured claim on the Petition Date covering the tax period ending June 30, 2015. SAC ¶ 27; App. 1512. When that liability was assessed, and therefore when the § 6502 collection period runs, is a fact outside the pleadings; if the Court considers it necessary, HMIT requests leave to plead it. *See* Part VIII.G.

V. PRIOR NOTE-COLLECTION ACTIONS DO NOT BAR THE RESERVED CLAIMS

Defendants next argue that earlier adversary proceedings to collect on intercompany notes bar the claims under the doctrine of res judicata, Doc. 69 at 44–47, but they misapply the doctrine. Res judicata bars a later suit only when the same claim or cause of action was involved in both, meaning the "same nucleus" of operative facts. *Sacks v. Tex. S. Univ.*, 83 F.4th 340, 344 (5th Cir. 2023). Here, Defendants cannot satisfy critical elements of the res judicata test because the note-collection actions were brought by a different entity that did not own the reserved claims and could not have asserted them, and they also involved a different nucleus of operative facts, and the Defendants' argument relies upon documents not properly before the Court.

A. There is no identity of parties for purposes of res judicata.

Defendants' res judicata argument depends on treating the Litigation Trustee as Highland's privy. Doc. 69 at 46. But Defendants are doublespeaking—when they address their standing arguments they insisted on the opposite. According to Defendants, "the Plan contained a clear division of rights." The Litigation Sub-Trust would control and pursue the Estate Claims. The

Claimant Trust would control the other Claimant Trust Assets. And the Reorganized Debtor would retain only the "Reorganized Debtor Assets." Doc. 69 at 25 (citing Plan Arts. I.B.26, I.B.115, IV.B.10). On that basis they argue that each Plan entity could pursue only the claims allocated to it, and that a transfer between them would be an impermissible modification of the Plan. *Id*. at 25, 28–30. Now they argue differently. If the Plan gave the Reorganized Debtor and the Litigation Sub-Trust separate and exclusive rights to different claims, the Reorganized Debtor did not represent the Sub-Trust's interest in the Estate Claims when it sued to collect on its notes, and the "privy" argument fails.

This allocation of rights is fatal to the "could have been raised" theory on which Defendants rely. The Plan reserved the Estate Claims, including "any and all estate claims and causes of action against Mr. Dondero, … other insiders of [Highland], and each of the Related Entities," for prosecution by the Litigation Trustee. SAC ¶ 25; Plan Art. IV.B.10 (App. 0544); Final Term Sheet, Bankr. Dkt. 354 (App. 0322). The Plan became effective on August 11, 2021. Notice of Effective Date, Bankr. Dkt. 2700 (App. 0580). From then on, the Reorganized Debtor that prosecuted the note actions to judgment had no right to assert the Estate Claims; those claims belonged to the Claimant Trust and the Litigation Sub-Trust. SAC ¶ 26. Res judicata does not and cannot bar claims that a party had no power to bring. And when the Bankruptcy Court confirmed the Plan, it expressly reserved the claims for separate prosecution. Claim preclusion does not apply. RESTATEMENT (SECOND) OF JUDGMENTS § 26(1)(b) (1982). The Plan's specific reservation of these claims for the Litigation Trustee is exactly that kind of reservation.

Defendants' authorities do not hold otherwise. *John Gannon, Inc. v. Tex. Dep't of Transp*., 2025 WL 1179874, at *6 (S.D. Tex. Apr. 23, 2025), aff'd as modified, 178 F.4th 906 (5th Cir. 2026), found privity between a state agency and the commission that oversees it. Doc. 69 at 46.

That relationship bears no resemblance to the relationship between separate Plan entities that, by Defendants' own account, hold distinct and exclusive rights to different claims.

B. The note-collection actions involved a different nucleus of operative facts.

The Fifth Circuit applies the transactional test. *Petro-Hunt, LLC v. United States*, 365 F.3d 385, 395–96 (5th Cir. 2004). The critical issue is the factual predicate of the claims, not the legal theories advanced. *Eubanks v. FDIC*, 977 F.2d 166, 171 (5th Cir. 1992).

The prior suits were collection actions. In Adv. Proc. No. 21-03005, Highland sued NexPoint Advisors, Dondero, Nancy Dondero, and Dugaboy on a May 31, 2017 promissory note in the principal amount of $30,746,812.33. *See* Am. Compl. ¶¶ 1, 20–21, Adv. Proc. No. 21-03005, Dkt. 63 (App. 0648–52). The complaint sought damages and turnover for default under that note. *Id*. ¶ 5. The parallel proceeding against HCMFA was the same. Highland sued to collect on demand notes and moved for summary judgment on defenses that the notes were signed by mistake or should have been treated as compensation. *See* Highland's MSJ ¶¶ 105–06, Adv. Proc. No. 21-03004, Dkt. 93 (App. 0956–57). Those suits decided only whether the notes were enforceable and whether an oral forgiveness existed, and they ended in judgments on the notes. *Matter of Highland Cap. Mgmt., L.P.*, 116 F.4th 422, 430, 435 (5th Cir. 2024). They did not adjudicate the wrongful transfers of Highland's advisory contracts; the diversion of new business and Highland's uncompensated services to the "lifeboats"; the 2017 Sentinel transaction; or the June 2018 Grey Royale escrow diversion. SAC ¶¶ 49–52, 147, 175–80, 186–187, 245–53, 261. The operative nucleus is different. *Petro-Hunt*, 365 F.3d at 395–96.

Defendants point to Counts IV, X, XI, XV, XVII, XXIII, and XXV. Doc. 69 at 46–47. Counts IV, XV, XVII, and XXV rest on the transfer of Highland's advisory contracts and the diversion of its business and assets, not on the notes. SAC ¶¶ 175–80, 264, 276–79, 329, 331–32. Counts X, XI, and XXIII refer to the intercompany notes as part of a much larger scheme. The

prior suits asked whether the notes were enforceable and whether an oral agreement forgave them. Those proceedings did not decide whether the notes were instruments of the broader scheme to strip Highland of its advisory business and fund insider distributions. That is a different factual predicate, not a different legal theory applied to the same facts. *Eubanks*, 977 F.2d at 171.

VI. THE LPA DOES NOT EXCUSE BAD-FAITH SELF-DEALING

Defendants next turn their focus on Highland's Fourth Amended and Restated Agreement of Limited Partnership (the "LPA"), which they contend eliminates the fiduciary-duty claims and leaves only a contractual duty of good faith the SAC allegedly failed to plead. Doc. 69 at 48–55. But the LPA does not support their argument. Delaware law forbids elimination of the implied covenant of good faith and fair dealing, 6 Del. C. § 17-1101(d), the safe harbors the LPA provides do not authorize the stripping of Highland's core advisory contracts or the diversion of its assets, and the SAC's allegations of willful misconduct and bad faith take the claims outside the exculpatory clause in the LPA anyway.

As a threshold matter, Delaware permits a partnership agreement to eliminate fiduciary duties, 6 Del. C. § 17-1101(d), but "default principles of fiduciary duty will apply unless a partnership agreement plainly provides otherwise," and restrictions on those duties must "be set forth clearly and unambiguously." *Miller v. Am. Real Estate Partners, L.P.*, 2001 Del. Ch. LEXIS 116, at *25, *28 (Del. Ch. Sept. 6, 2001). Highland's LPA does not meet this test. No provision states that the general partner owes no fiduciary duties, or that its duties are limited to those the agreement sets out. Article 4.1(g) describes what conduct is not a breach: action taken "in the absence of bad faith." Article 4.1(i)(i) is an exculpation clause providing that Strand and its directors and officers "shall not be liable" for conduct short of gross negligence or willful or wanton misconduct. LPA Arts. 4.1(g), 4.1(i)(i) (App. 0174–75). As the Court of Chancery explained in *Miller*, which Defendants' Motion ignores, an exculpation clause that preserves

liability for bad-faith conduct "is, on balance, more consistent with a reading . . . that leaves room for the application of the fiduciary duty of loyalty." 2001 Del. Ch. LEXIS 116, at *30–31; *see Feeley v. NHAOCG, LLC*, 62 A.3d 649, 664 (Del. Ch. 2012). And in *Miller*, as here, the general partner held broad discretion over the partnership's management and distributions, *id.* at *21–22, yet the court held that it owed loyalty-based duties and declined to rule out a fairness standard for self-dealing transactions. *Id.* at *33–35. At most, Article 4.1(g) substitutes a bad-faith standard for the default standards. Either way the claims survive, because the SAC pleads bad faith. *See* Part VI.C, *infra*.

Defendants' cited authorities illustrate the difference. In *Allen*, the partnership agreement provided that, "[e]xcept as expressly set forth in [the LPA], neither [the general partner] nor any other Indemnitee shall have any duties or liabilities, including fiduciary duties," and that the agreement's provisions "are agreed by the Partners to replace such other duties and liabilities." *Allen v. Encore Energy Partners, L.P.*, 72 A.3d 93, 100 (Del. 2013). The agreement also extended that rule expressly to the general partner's affiliates, including the directors and controllers who were sued. *Id*. at 101. Here, however, Highland's LPA does not state that the general partner owes no duties other than those the LPA sets out, and nothing in it extends Article 4.1(g) beyond "the General Partner."

Norton, another case upon which Defendants rely, involved a provision under which "[a]ny standard of care and duty imposed by [the LPA] or [DRULPA]" was "modified, waived or limited" so long as the general partner's action was "reasonably believed by [it] to be in, or not inconsistent with, the best interests of the Partnership." *Norton v. K-Sea Transp. Partners L.P.*, 67 A.3d 354, 361–62 (Del. 2013). But even where an agreement substitutes a contractual standard for the default duties, the substituted standard governs. *Id*. at 362. Here, the only standard Article 4.1(g) supplies is the absence of bad faith, and the SAC pleads bad faith.

Lastly, *In re Kilroy*, on which Defendants principally rely, Doc. 69 at 48–50, does not carry the weight Defendants suggest. *Kilroy* asked whether a debtor had acted "in a fiduciary capacity" for purposes of nondischargeability under 11 U.S.C. § 523(a)(4), a concept the court described as "narrowly defined." *Guerriero v. Kilroy (In re Kilroy)*, 2008 Bankr. LEXIS 827, at *17–18 (Bankr. S.D. Tex. Mar. 24, 2008). The court answered that question on a summary-judgment record in which the plaintiff "completely fail[ed] to respond" to the partnership-agreement argument. *Id*. at *21. The agreement there also contained an affirmative standard of conduct, providing that the general partner "shall conduct the affairs of the Partnership in good faith toward the best interest of the Partnership," which the court read as reducing the general partner's duties to "a duty of good faith." *Id*. at *19, *21. Here, Highland's LPA contains no comparable standard-of-conduct provision. Even further, under *Kilroy*, the general partner remained answerable for bad faith, which is exactly what the SAC alleges.

Article 4.1(g), moreover, applies only to "action taken by the General Partner." It says nothing about Dondero's duties, who is sued individually as the person who controlled Strand and, through it, Highland. SAC ¶¶ 12, 30, 182. Under Delaware law, the directors and controllers of a corporate general partner who exercise control over partnership property owe fiduciary duties directly to the partnership. *In re USACafes, L.P. Litig*., 600 A.2d 43, 48–49 (Del. Ch. 1991). Those duties arise from Dondero's control, not from the LPA, and no provision of the LPA purports to eliminate those duties. Defendants may point to *Kilroy*'s statement that where an agreement limits the general partner's duties to good faith, "a higher standard may not be imposed" on the person who controls it. 2008 Bankr. LEXIS 827, at *22. But, making that assumption for argument purposes only, that only confirms the point: on that reading, Dondero, like Strand, remains liable for bad faith. And, at most, Article 4.1(i)(i) would limit Dondero's liability, as a director of Strand, for conduct short of gross negligence or willful or wanton misconduct, which is not what the SAC

alleges. *See* Part VI.C, *infra*. Even if a partnership agreement eliminates fiduciary duties it **cannot** eliminate liability "for any act or omission that constitutes a bad faith violation of the implied contractual covenant of good faith and fair dealing." 6 Del. C. § 17-1101(f).

A. The LPA does not eliminate fiduciary duties.

Delaware law gives maximum effect to the freedom of contract in limited partnership agreements, but it draws a hard line. A partnership agreement "may expand, restrict, or eliminate any fiduciary duties that a partner or other person might otherwise owe," but it "may not eliminate the implied contractual covenant of good faith and fair dealing." 6 Del. C. § 17-1101(d); *Gerber v. Enterprise Products Holdings, LLC*, 67 A.3d 400, 418–19 (Del. 2013) (contractual conclusive presumption of good faith does not eliminate the implied covenant); *Norton*, 67 A.3d at 360 (LPA may modify or eliminate fiduciary duties but may not eliminate the implied covenant). Neither Article 4.1(g) nor Article 4.1(i)(i) purports to eliminate the implied covenant, LPA Arts. 4.1(g), 4.1(i)(i) (App. 0174–75), and Delaware law would not allow it.

Article 4.1(g) of the Highland LPA provides that any action taken by the General Partner "in the absence of bad faith by the General Partner, shall not constitute a breach of this Agreement or any other agreement contemplated herein or a breach of any standard of care or duty imposed herein or therein or under the Delaware Act or any other applicable law, rule, or regulation." LPA Art. 4.1(g) (App. 0174). Article 4.1(i)(i) likewise provides that neither the General Partner "nor its directors, officers, employees, agents, or representatives shall be liable to the Partnership or any Limited Partner for errors in judgment or for any acts or omissions that do not constitute gross negligence or willful or wanton misconduct." LPA Art. 4.1(i)(i) (App. 0175).

Defendants criticize the SAC for not identifying a "specific clause of the LPA" that was breached. Doc. 69 at 51. That objection assumes its conclusion. Because the LPA did not displace the default fiduciary duties, HMIT was not required to plead its fiduciary-duty claims as contract

claims. And if the Court were to conclude that the LPA substituted a contractual good-faith standard, the result would be for this Court to grant leave to replead the same facts under that standard, not dismissal. *See* Part VIII.G, *infra*. Even under the contractual standard Defendants seek to invoke, the question is whether the general partner acted in good faith, and that question cannot be resolved against HMIT on allegations that Dondero created NexPoint "to siphon profits from HCMLP in order to evade HCMLP's creditors" and structured HCMFA "to ensure that the profits generated by the business would not be available to HCMLP's litigation creditors." SAC ¶¶ 41, 50.

B. The LPA provides no safe harbors for Defendants' wrongful conduct.

The LPA permits Strand and its representatives to have "business interests and activities in direct competition with" Highland. LPA Art. 4.1(f) (App. 0174). It also vests exclusive management power in Strand and gives it "full power and authority to do all things deemed necessary or desirable," including authority over the acquisition, disposition, and use of Partnership assets, the distribution of Partnership cash, and the conduct of litigation. LPA Art. 4.1(a) (App. 0172–73). Defendants urge these provisions as a complete safe harbor for every transaction described in Counts IV, V, and XIV. Doc. 69 at 50–55. They are not.

Although Article 4.1(f)'s competition clause authorizes outside activity, it does *not* authorize a transaction in which the general partner stands on both sides and uses partnership assets for its own benefit. *See Cont'l Ins. Co. v. Rutledge & Co.*, 750 A.2d 1219, 1237 (Del. Ch. 2000). In *Rutledge*, which Defendants' Motion ignores, the limited partnership agreement permitted the general partner to "engage in other business activities or possess interests in other business activities of every kind and description, independently or with others." *Id*. at 1236. The Court of Chancery held that the clause diminished the duty of loyalty only as to activities outside the partnership but did not authorize self-dealing "in which [the general partner] stands on both sides

of a transaction" or permit the general partner "to use its position as general partner, and its ability to control the terms of transactions, to invest limited partnership funds for its own gain, as opposed to investing for the benefit of the limited partnership." *Id*. at 1237.

Defendants' cited authorities are not to the contrary. *U.S. Cellular Inv. Co. of Allentown v. Bell Atl. Mobile Sys., Inc.*, 677 A.2d 497 (Del. 1996), shields a general partner "acting in good faith reliance on the provisions of the partnership agreement." *Id*. at 504; Doc. 69 at 50. That protection depends on good faith, and it does not convert a grant of management authority into permission to use that authority against the partnership. Likewise, in *Cincinnati SMSA Ltd. P'ship v. Cincinnati Bell Cellular Sys. Co*., 708 A.2d 989 (Del. 1998), the agreement "unambiguously and expansively" authorized the partner to pursue the competing venture at issue. *Id*. at 993; Doc. 69 at 50. And *In re Hennessy Cap. Acquisition Corp. IV S'holder Litig.*, 318 A.3d 306 (Del. Ch. 2024), aff'd, 337 A.3d 1214 (Del. 2024), which holds that conclusory allegations of conflict do not state a claim, *id*. at 310, 319–20, has no application to a complaint, such as the SAC, that identifies specific transfers, by date and amount, to entities the defendants owned.

In Count IV, HMIT alleges that Strand and Dondero transferred Highland's flagship advisory and management contracts—and the fees those contracts generated—to NexPoint, HCMFA, and other "lifeboat" entities. SAC ¶¶ 50–65, 175–80. Highland continued to perform the same services through the same employees, but received only a fraction of the profits or, in some instances, provided the services at a loss because the agreements with the "lifeboat" entities did not cover Highland's costs. *Id*. Strand and Dondero controlled both sides of those transactions. The LPA's permission to compete does not authorize the General Partner to strip the partnership's core advisory opportunities to entities that Dondero owns while leaving the partnership to perform the work at a loss. But that is the essence of Defendants' flawed argument.

Defendants contend that the SAC "identifies no particular transaction, service, market value, contractual term, or other fact" showing that the diversion was unfair to Highland, Doc. 69 at 52. But this contention is simply not true. The SAC alleges that between 2012 and 2015, NexPoint had no employees of its own and used Highland's employees to perform the same advisory, compliance, accounting, tax, and other services Highland performed. SAC ¶ 42. Between 2015 and 2019, NexPoint's assets under management grew by approximately 408%, from $936 million to $4.8 billion. *Id.* ¶ 49. Highland's employees served as named portfolio managers and supporting analysts for HCMFA-managed funds, yet Highland received only "a small fraction of the fees earned by HCMFA" and no fee at all for its advisory services; HCMFA never executed a sub-advisory agreement, and only in May 2018 did it agree to reimburse even part of Highland's payroll cost. *Id.* ¶ 52. And Dondero signed the intercompany agreements on both sides. *Id.* ¶ 110. Even a cursory read of the SAC contradicts the Defendants' criteria. In any event, whether those arrangements were fair to Highland is a question of fact that cannot be resolved in Defendants' favor in this Rule 12(b) proceeding.

Count XIV alleges the same wrongful pattern with Highland's cash assets, alleging that Strand and Dondero caused Highland to enter consulting agreements with Massand Capital for services Massand performed for SAS, an entity owned by Dondero and Ellington. SAC ¶¶ 140–44, 258. It alleges that Dondero and Ellington diverted approximately $3 million in HE Capital 232 sale proceeds, held in escrow for Highland, to Grey Royale Ltd., a Cayman Islands entity they separately owned, SAC ¶¶ 145–149, 261, and it alleges they approved hundreds of millions of dollars of distributions to Dondero and Okada when Highland was insolvent. SAC ¶¶ 137–57, 259.

Article 3.9(a) of the LPA permits Strand to make distributions "in its sole and unfettered discretion," LPA Art. 3.9(a) (App. 0169), but that discretion does not abrogate the implied covenant, 6 Del. C. § 17-1101(d), or authorize distributions made in bad faith. *See Miller v. HCP*

Trumpet Invs., LLC, 2018 Del. LEXIS 429, at *2 (Del. Sept. 20, 2018) (en banc) ("the mere vesting of 'sole discretion' did not relieve the Board of its obligation to use that discretion consistently with the implied covenant of good faith and fair dealing"). Nor does Article 4.1(a) authorize the diversion of escrowed sale proceeds to an entity the General Partner's principal owned.

Count V's allegations of conduct that produced third-party liabilities are no more protected. The SAC alleges that Strand, through Dondero, Ellington, and Leventon, caused Highland to conceal the transfer of Fund Counterparty assets to Sentinel (an entity in which Ellington held an interest and derived illicit benefit), to strip Acis of assets so Acis could not satisfy an adverse arbitration award, to induce HarbourVest's investment under false pretenses, and to violate the Crusader Funds distribution plan, resulting in a $190 million award against Highland. SAC ¶¶ 67–93, 185–96. Article 4.1(a) gives Strand control over litigation and the use of Partnership assets, but it does not authorize the General Partner to cause Highland to incur substantial liabilities by concealing transfers, stripping assets from related entities, or looting cash by funneling distributions for the benefit of entities the General Partner and its officers controlled.

C. Willful misconduct and bad faith allegations are not protected.

Even if the LPA's competition and distribution provisions could be stretched as broadly as Defendants urge, which is patently wrong, the LPA expressly takes willful or wanton misconduct and bad faith outside them. LPA Arts. 4.1(g), 4.1(i)(i) (App. 0174–75). The SAC alleges both.[9] It also alleges that Dondero and Strand willfully and wantonly orchestrated the "lifeboat" scheme for the purpose of transferring value away from Highland's creditors. SAC Count IV ¶¶ 175–80. It alleges that Dondero, Ellington, and Leventon knowingly caused Highland to conceal the

[9] *See VTX Commc'ns, LLC v. AT&T Inc.*, 2020 WL 4465968, at *15 (S.D. Tex. Aug. 4, 2020) ("In general, exculpatory provisions are affirmative defenses that cannot provide a basis for dismissal."); *In re Simplexity, LLC*, 2017 WL 65069, at *6 (Bankr. D. Del. Jan. 5, 2017) (same); *Ad Hoc Comm. of Equity Holders of Tectonic Network, Inc. v. Wolford*, 554 F. Supp. 2d 538, 561 & n.161 (D. Del. 2008) (collecting cases).

Sentinel transfer, strip Acis of assets, induce the HarbourVest investment, and violate the Crusader Funds distribution plan, producing substantial third-party liabilities. SAC Count V ¶¶ 185–96. It alleges that Dondero and Ellington diverted approximately $3 million held in escrow for Highland to an entity they separately owned. SAC Count XIV ¶ 261. This conduct involves intentional self-dealing and willful misconduct, not errors in judgment or ordinary competitive activity, and therefore falls outside the safe harbor clauses that Defendants urge.

Defendants also invoke Article 4.1(i)(ii), which provides that Strand "shall not be responsible for any misconduct or negligence on the part of any agent or representative appointed by" it. LPA Art. 4.1(i)(ii) (App. 0175); Doc. 69 at 49. Dondero owned Strand, exercised complete dominion and control over Strand, and controlled Highland through Strand. Dondero was not an agent Strand appointed. SAC ¶¶ 12, 30, 182, 184. A corporate general partner acts through those who control it, *see USACafes*, 600 A.2d at 48–49, and Dondero's bad faith and willful misconduct are Strand's own. Strand was the mechanism through which Dondero raided and absconded with Highland's assets and business opportunities. Article 4.1(i)(ii) does not insulate Strand, and it does not override the LPA's carve-outs for bad faith and willful misconduct or the limits imposed by 6 Del. C. § 17-1101(f).

VII. THE SAC DOES NOT ASSERT LEGAL MALPRACTICE CLAIMS

Defendants next seek to recast the claims against Ellington and Leventon as professional negligence claims as if this "labeling" has any connection to reality. Doc. 69 at 26–27. On this faulty premise, Defendants contend that the claims could not have been transferred to the Litigation Sub-Trust or to HMIT; they also invoke Texas's two-year limitations period for professional negligence, *id*. at 37, and they argue that the SAC fails to allege that Ellington or Leventon owed or breached fiduciary duties to Highland. *Id*. at 55–59. Each argument rests on the same premise, and the premise is flat wrong.

The SAC alleges that Ellington and Leventon knowingly participated, as officers and insiders, in the same self-dealing and asset-stripping transactions pleaded against Dondero and Strand, and that they profited from them. The fact that they are also attorneys does not convert these claims into malpractice claims. To do so would ignore the self-dealing and bad faith the SAC alleges.

A. The gravamen of the claims does not arise from legal services.

The SAC alleges that Ellington and Leventon participated in the transfer of more than $100 million in assets to Sentinel, a Cayman Islands entity owned by Dondero and Ellington, and later concealed that transfer from Highland's Independent Board, UBS, and the Bankruptcy Court. SAC ¶¶ 65–67, 186–187. It alleges they took part in stripping Acis of its assets to defeat an adverse arbitration award, *id*. ¶¶ 191–192, and in the misconduct in the Crusader Funds wind-down, *id*. ¶ 194. It alleges that Ellington participated in the fraudulent inducement of HarbourVest, *id*. ¶ 193; in the diversion of Highland's funds to SAS through the Massand Consulting Agreements, *id.* ¶ 258; and in the diversion of $2.98 million in escrowed Highland funds to Grey Royale, a Cayman Islands entity that he and Dondero owned, *id*. ¶¶ 147, 261. Those are allegations of knowing participation in the diversion of Highland's assets, not allegations that Ellington or Leventon failed to exercise care in how they drafted documents to accomplish these diversions.

Ellington held the title of Highland's "Chief Legal Officer and General Counsel," SAC ¶¶ 18, 182, a title Defendants acknowledge, Doc. 69 at 56. Leventon was Highland's "Assistant General Counsel." SAC ¶¶ 19, 182. As Highland's employees, both acted as its agents. And Dondero "delegated authority to his loyalists irrespective of their titles or roles," including by giving Ellington decision-making authority over Acis. *Id*. ¶ 111. A claim that an officer or agent participated in a fiduciary breach or a fraudulent transfer does not become a malpractice claim because the perpetrator also held a law license. *See* Part VII.B.

The SAC also alleges that Ellington and Leventon obtained improper benefits from these transactions, far beyond their salaries. Ellington owned 30% of Sentinel, the offshore entity that received the Fund Counterparties' assets, and he charged more than $500,000 in personal expenses to the Sentinel insurance policy. SAC ¶¶ 66 & n.17, 67. Sentinel agreed to pay the attorneys' fees that both Ellington and Leventon incurred in Highland's bankruptcy. *Id*. ¶ 67. Ellington owned 30% of SAS, whose expenses he caused Highland to bear through the Massand Consulting Agreements. *Id.* ¶¶ 21, 258. He co-owned Grey Royale, which received the escrowed funds diverted from Highland. *Id*. ¶¶ 147, 261. And Dondero arranged undisclosed payments to both Ellington and Leventon through Tall Pine, from accounts held by other Dondero entities. *Id.* ¶ 153; *see id*. ¶¶ 184, 271 (both were "compensated in excess of their HCMLP salaries by Dondero ... for their participation"). In carrying out the conspiracy, Ellington and Leventon "acted outside the scope of their HCMLP employments, as agents of the non-HCMLP entities they owned and controlled, and for their personal benefits." *Id.* ¶ 268. These are allegations that two fiduciaries enriched themselves at their principal's expense. They are not allegations about the quality or adequacy of legal advice.

Delaware law, which governs the claims as discussed in Part VII.B, defines the duties at issue. Dondero and Strand owed Highland fiduciary duties as its general partner and controller. Those who control a corporate general partner owe fiduciary duties directly to the partnership. *USACafes*, 600 A.2d at 48–49. A general partner of a Delaware limited partnership owes fiduciary duties of care and loyalty that parallel the duties directors of a Delaware corporation owe to stockholders. *Dohmen v. Goodman*, 234 A.3d 1161, 1167–68 (Del. 2020). Ellington and Leventon, in turn, owed Highland the duties that every officer and agent owes. An agent owes his principal a duty of good faith, loyalty, and fair dealing. *Triton Constr. Co. v. E. Shore Elec. Servs., Inc*., 2009 Del. Ch. LEXIS 88, at *25 (Del. Ch. May 18, 2009), aff'd, 988 A.2d 938 (Del. 2010). As

Highland's agents, Ellington and Leventon may not act antagonistically toward, or cause injury to, their principal. *Sci. Accessories Corp. v. Summagraphics Corp.*, 425 A.2d 957, 962 (Del. 1980).

Ellington and Leventon are also liable for knowingly participating in Dondero's and Strand's breaches. Imposing liability for aiding-and-abetting requires a fiduciary relationship, a breach of the fiduciary's duty, knowing participation in that breach and resulting damages. *Malpiede v. Townson*, 780 A.2d 1075, 1096 (Del. 2001); *see Gotham Partners, L.P. v. Hallwood Realty Partners, L.P.*, 817 A.2d 160, 172–73 (Del. 2002) (affirming aiding-and-abetting liability of affiliate that knowingly participated in general partner's breach). Counts XVI, XXX, and XXXI rest on that theory.

Defendants point to allegations that Leventon "assisted in the drafting and execution of" an agreement that moved assets out of Acis, SAC ¶ 192, and that he communicated misrepresentations to the Redeemer Committee, *id.* ¶ 194. Doc. 69 at 27. Those allegations describe the means by which the scheme was implemented, not the gravamen of the claims. A fiduciary who knowingly uses legal skills to carry out a self-dealing scheme that injures his client is not sued for the quality of his legal work.

B. Texas anti-fracturing rules do not apply.

Delaware law governs these claims, not Texas law. Texas choice-of-law rules apply, and by statute they direct that the law of an entity's jurisdiction of formation governs its "internal affairs," including "the rights, powers, and duties of its governing authority, governing persons, officers, owners, and members." TEX. BUS. ORGS. CODE §§ 1.102, 1.105; *see id.* § 1.104; *Hollis v. Hill*, 232 F.3d 460, 464–65 (5th Cir. 2000) (applying the law of the state of incorporation to fiduciary-duty claims under Texas choice-of-law rules). Highland is a Delaware limited partnership, and Defendants rely on these provisions themselves, Doc. 69 at 34 n.13, when they

analyze the fiduciary duties owed to Highland under Delaware law throughout their brief, *id*. at 48–56.[10]

Because the claims against Ellington and Leventon are Delaware fiduciary duty claims, Texas professional negligence standards do not apply. Nor does Texas's rule against assigning legal malpractice claims. Defendants' cases, Doc. 69 at 26, applied that rule to claims that lawyers acted improperly in providing legal services to a client. *See Zuniga v. Groce, Locke & Hebdon*, 878 S.W.2d 313, 314, 318 (Tex. App.—San Antonio 1994, writ ref'd) (defense counsel's handling of client's litigation); *Vinson & Elkins v. Moran*, 946 S.W.2d 381, 396 & n.10 (Tex. App.—Houston [14th Dist.] 1997, writ dism'd by agr.) (estate counsel; plaintiffs called it "a legal malpractice case"); *Britton v. Seale*, 81 F.3d 602, 605 (5th Cir. 1996) (each claim alleged attorneys "acted improperly in the course of performing legal services for a client"). The SAC alleges instead that Ellington and Leventon, as Highland's officers and agents, participated in self-dealing transactions and took improper benefits from them.

The Texas anti-fracturing rule, which prevents a plaintiff from recasting a malpractice claim as a breach of fiduciary duty, has no application here. And even if Texas law applied, the anti-fracturing rule would not bar these claims. That is because the rule ***only*** applies when the gravamen of the claim at issue is the quality of the attorney's professional services. *Pitts v. Rivas*, 709 S.W.3d 517, 524–25 (Tex. 2025). It does not reach a claim that a fiduciary, like Leventon and Ellington, obtained improper benefits or acted against their principal for their own gain. *Beck v. Law Offices of Edwin J. (Ted) Terry, Jr., P.C.*, 284 S.W.3d 416, 426–27 (Tex. App.—Austin 2009,

[10] Defendants' contrary suggestion relies on their inapposite citation to *EH Nat'l Bank v. Tran*, 2016 U.S. Dist. LEXIS 102301, at *11 (N.D. Tex. Aug. 4, 2016). Doc. 69 at 26 n.8. *Tran* was a malpractice suit against outside counsel for failing to verify a check, and the only choice-of-law question was whether Texas's proportionate-responsibility statute or Montana law applied. *Id*. at *7–12. Its statement that a Texas attorney's duties are defined by Texas law concerned "matters related to the professional negligence claim." *Id*. at *11. And *Tran* applied the Restatement balancing test only because no "statutory directive" governed the issue. *Id*. at *9. Here one does.

no pet.) (complaints about an attorney's care, skill, or diligence in representing a client implicate the duty of ordinary care and sound in negligence; a claim for breach of fiduciary duty focuses on whether the attorney obtained an improper benefit from representing the client). Defendants' own authority draws the same line. Claims of breach of fiduciary duty against an attorney "focus on whether the attorney obtained an improper benefit from representing the client and involve the integrity and fidelity of the attorney." *Won Pak v. Harris*, 313 S.W.3d 454, 457 (Tex. App.—Dallas 2010, pet. denied); Doc. 69 at 26; *see also Murphy v. Gruber*, 241 S.W.3d 689, 693 (Tex. App.—Dallas 2007, pet. denied) (an attorney breaches his fiduciary duty by, among other things, "subordinating his client's interest to his own, . . . engaging in self-dealing, . . . or making misrepresentations to achieve these ends") (quoting *Gibson v. Ellis*, 126 S.W.3d 324, 330 (Tex. App.—Dallas 2004, no pet.)). The SAC alleges exactly that. SAC ¶¶ 66–67, 79, 147–48, 153, 187, 261, 271. For the same reason, the two-year limitations period for professional negligence, Doc. 69 at 37, does not apply.

Defendants argue that the SAC does not allege that Strand formally designated Ellington or Leventon as officers under Article 4.1(k) of the LPA. Doc. 69 at 55–56. But Ellington held an officer's title, and Dondero delegated authority to both "irrespective of their titles or roles," *see* Part VII.A; the duty of loyalty an agent owes his principal does not depend on a formal title. *Triton*, 2009 Del. Ch. LEXIS 88, at *30–31; *Sci. Accessories*, 425 A.2d at 962. Article 4.1(k) authorizes Strand to designate officers and delegate tasks. It does not eliminate the duties that accompany those roles, and it does not transform participation in self-dealing into a malpractice claim. LPA Art. 4.1(k) (App. 0175).

C. Defendants' remaining malpractice-based arguments also fail.

Ellington and Leventon offer three more arguments, each borrowed from the law of legal malpractice. Doc. 69 at 57–59. Each fails for the reason already given, and on their own terms.

First, Ellington and Leventon cannot defend on the ground that they "obey[ed] and follow[ed] a client's lawful instruction." Doc. 69 at 57 (citing *Edwards v. Dunlop-Gates*, 344 S.W.3d 424, 433 (Tex. App.—El Paso 2011, pet. denied); *Wolf v. Ramirez*, 622 S.W.3d 126, 142–43 (Tex. App.—El Paso 2020, no pet.)). Their client was Highland, not Dondero. A lawyer "employed or retained by an organization represents the entity." TEX. DISCIPLINARY RULES PROF'L CONDUCT R. 1.13(a) (formerly R. 1.12). When the lawyer knows that an officer or employee "has committed or intends to commit a violation of a legal obligation to the organization" that "is likely to result in substantial injury to the organization," the lawyer "must take reasonable remedial actions" and "shall proceed as reasonably necessary in the best interest of the organization." *Id*. at 1.13(a)–(b). The disciplinary rules do not define standards of civil liability, *id*. Preamble ¶ 15, but they confirm whom Ellington and Leventon served: Highland, not Dondero.

As shown in Part VII.A, the conduct alleged, including the Grey Royale diversion and the concealment of the Sentinel transfer, was not lawful. No authority permits an attorney to participate in that wrongful conduct because a superior told him to. To the contrary, an attorney who knowingly participates in a fraudulent scheme is personally liable. *Likover v. Sunflower Terrace II, Ltd.*, 696 S.W.2d 468, 472 (Tex. App.—Houston [1st Dist.] 1985, no writ); *see Poole v. Houston & T.C. Ry. Co.*, 58 Tex. 134, 137 (1882). Delaware law is the same: knowing participation in a fiduciary's breach is itself actionable. *Malpiede,* 780 A.2d at 1096; *see* Part VII.A.

Second, the *Segerstrom* case cited by Defendants does not make Highland's supposed "satisfaction" with its lawyers' work a defense. Doc. 69 at 57–58 (citing *In re Segerstrom*, 247 F.3d 218, 226 (5th Cir. 2001)). Rather, *Segerstrom* described the personal nature of a legal-malpractice claim, and these are not malpractice claims. *See* Part VII.A. In any event, the only "satisfaction" Defendants identify is that of Dondero, the person who directed the wrongful

conduct and benefited from it, and who was Highland's "solitary decision-maker" until January 2020. SAC ¶¶ 30, 111, 184. Highland could act and know only through its agents, and when those agents were the wrongdoers acting against it, their approval is not Highland's. *See* Part IV.D.2; *Dawson*, 4 F.3d at 1309–12. To suggest otherwise defies logic. Once Dondero was removed, Highland terminated both Ellington and Leventon for cause. SAC ¶¶ 19, 359. Defendants' cited cases cautioning against assigning a client's malpractice claim to the client's litigation adversary, Doc. 69 at 58 (citing *McLaughlin v. Martin*, 940 S.W.2d 261 (Tex. App.—Houston [14th Dist.] 1997, no writ) and *Charles v. Tamez*, 878 S.W.2d 201 (Tex. App.—Corpus Christi 1994, writ denied)), are beside the point for the same reason: these are not malpractice claims.

Third, the SAC is not required to plead the "case-within-a-case" causation that governs negligent legal representation. Doc. 69 at 58–59 & n.25 (citing *Rogers v. Zanetti*, 518 S.W.3d 394, 404 (Tex. 2017); *Taylor v. Scheef & Stone, LLP*, 2020 WL 4432848, at *5–7 (N.D. Tex. July 31, 2020)). Any suggestion that it applies here is misplaced because HMIT is not alleging that Ellington and Leventon gave Highland deficient advice that caused it to lose a case it should have won. It alleges they took part in diverting Highland's assets and concealing that diversion, and that Highland was injured by the loss of those assets and by the liabilities that ensued, including the $50 million increase in UBS's allowed claim once the secretive Sentinel transfer came to light. SAC ¶¶ 66–67, 140–48, 184–96, 258–61. Causation for that injury is direct. And to the extent HMIT seeks disgorgement of the benefits Ellington and Leventon obtained through Sentinel, SAS, Grey Royale, and Tall Pine, neither Delaware nor Texas law requires proof of actual damages. *Thorpe*, 676 A.2d at 445; *First United Pentecostal Church of Beaumont v. Parker*, 514 S.W.3d 214, 220–21 (Tex. 2017) (client seeking equitable forfeiture or disgorgement from its attorney need not prove causation or actual damages); *Burrow v. Arce*, 997 S.W.2d 229, 239–40 (Tex. 1999). Defendants' contention that Ellington is merely "lumped together with Dondero" in Count

XIV, Doc. 69 at 58, ignores the allegations specific to him: he personally directed the escrow agent to wire the Grey Royale funds and later misdescribed them to Highland's Tax Director, and he owned 30% of SAS, whose costs Highland bore through the Massand Transfers. SAC ¶¶ 21, 147–48, 258, 261.

Finally, Defendants contend in a footnote that the Tall Pine payments cannot support the claims because they were made after the Petition Date and were part of "the ordinary compensation promised by Highland." Doc. 69 at 57 n.24. The timing does not help Defendants, and the SAC makes no such concession. Indeed, in state court these same Defendants describe those allegations as "surreptitious payments in exchange for no services." *See supra* n.6. The SAC alleges that after the Petition Date Dondero "surreptitiously approved" wire transfers to Tall Pine from accounts held by NexPoint, NexBank, and DAF Holdco, not Highland, to pay Ellington and Leventon amounts they would have received in 2020 "but for the Committee's objection," and that neither disclosed those payments to the Independent Board. SAC ¶ 153. It further alleges that both were "compensated in excess of their HCMLP salaries by Dondero . . . for their participation" in the scheme. *Id.* ¶ 271. Payments routed around the estate by the scheme's architect, to override a creditor objection, are not "ordinary compensation," and whether they rewarded the conduct alleged and should therefore be disgorged is a question of fact. The Tall Pine payments are, in any event, only one of the benefits alleged. *See* Part VII.A.

VIII. THE SAC SATISFIES RULES 8(a) AND 9(b)

Defendants contend that nearly every count in the SAC fails Rule 9(b) because the allegations "sound in fraud." Doc. 69 at 59–64. This hyperbolic criticism is just wrong. Rule 9(b) does not apply to the constructive fraudulent-transfer or preference claims; those claims are governed by Rule 8(a). The intentional fraudulent-transfer counts plead the transfers, the parties, the absence of reasonably equivalent value, and multiple badges of fraud with sufficient

particularity. The remaining counts either identify each Defendant's role in specific transactions or are remedial theories that accompany the primary claims. Defendants include tortious interference (Count XVII) and conversion (Count XXII) in their Rule 9(b) challenge, Doc. 69 at 59–60 n.26, 63–64, but neither claim depends on a misrepresentation, and Rule 9(b) does not apply to them.

A. Rule 8(a) applies to constructive fraudulent-transfer or preference claims.

As shown in Part I.C, constructive fraudulent-transfer and preference claims are governed by Rule 8(a), not Rule 9(b). *Life Partners*, 926 F.3d at 117–18, 122. *See also In re Anadrill Directional Servs.*, 2026 Bankr. LEXIS 302, at *13 (Bankr. S.D. Tex. Feb. 4, 2026) ("Courts in the Fifth Circuit routinely apply the general pleading standard of Rule 8(a) to constructive fraudulent transfer claims"). Defendants seemingly ignore this distinction.

B. The intentional fraudulent-transfer counts plead badges of fraud and transaction-specific facts.

The intentional fraudulent-transfer counts identify the transfers, the parties, the absence of reasonably equivalent value, and multiple badges of fraud. SAC Counts II, XIII, XIX, XXI, XXIX. Rule 9(b) is satisfied when the complaint alleges the "who, what, when, where, and how" of the alleged fraud. *Benchmark Elecs., Inc. v. J.M. Huber Corp.*, 343 F.3d 719, 724 (5th Cir. 2003). In the fraudulent-transfer context, that standard is met by allegations that identify the transfers, the parties to them, the dates or time periods on which they occurred, and facts supporting an inference of fraudulent intent. *Life Partners*, 926 F.3d at 118–19 (complaint sufficient under Rule 9(b) where it identified the transferor, transferee, amount, and time periods, and contained "pages of allegations detailing the underlying fraudulent scheme"). The SAC readily meets this standard.

The SAC identifies specific transfers of advisory-contract rights and cash, including the December 15, 2011 diversion of management agreements for the Transferred Funds to HCMFA,

the subsequent transfer of the Highland Credit Strategies Fund to NexPoint, the Massand Transfers, the Grey Royale escrow diversion, insider distributions, and eve-of-bankruptcy payments. SAC ¶¶ 245–48, 251–53, 258–61. It alleges that the transfers were made to or for the benefit of insiders, that Highland received less than reasonably equivalent value, and that Highland was insolvent or became insolvent as a result. SAC ¶¶ 246–47, 252. It further alleges multiple badges of fraud, including that Dondero was an insider of both the transferor and the transferees, that the transfers were part of a multi-faceted scheme to defraud creditors by moving value into newly-created "lifeboat" entities, that the transfers were made while Highland was insolvent or undercapitalized, and that they were effected to place value beyond the reach of present and future creditors. SAC ¶ 252(a)–(f).

The same is true of the other intentional-transfer counts. Doc. 69 at 59–60 & n.26. Count II lists each distribution by date, recipient, and amount, SAC ¶ 163, and pleads specific badges of fraud, *id.* ¶ 165(a)–(h). Count XXI pleads that the Massand Transfers were made for no consideration, for the benefit of SAS, an entity Dondero and Ellington owned, while Dondero believed Highland would be forced into bankruptcy. *Id.* ¶¶ 21, 295–97, 303(a)–(f). Count XIX, which is not asserted against any moving Defendant, identifies the two agreements it challenges by date and party and pleads seven badges of fraud. *Id.* ¶¶ 289–90(a)–(g).

Defendants' objections to the claims involving Massand fare no better. They claim the SAC "never identifies a single specific payment," rests on an allegation that "it appears" no services were rendered, and does not show how any Defendant participated. Doc. 69 at 60. Not true: the SAC lists every Massand Transfer by date and amount: thirty-two monthly payments from January 3, 2017 through August 1, 2019, totaling $1,742,082. SAC ¶ 302. It identifies who was responsible. Dondero and Ellington were to assign Massand its "tasks" under the consulting agreements, and

they "oversaw and approved the Massand Transfers." *Id*. ¶¶ 140, 258. And the SAC also pleads the facts from which it infers that no services were rendered to Highland:

- Highland had no "Investment Recovery Strategies business in the Countries of the Gulf Cooperation Council" for Massand to advise on. *Id*. ¶ 142.
- Massand's invoices "contained no information about the services it purportedly rendered," and their consecutive numbering shows that Highland was its only customer. *Id*. ¶¶ 141, 297.
- Dilip Massand held an SAS email address and the title of SAS "Managing Director," took part in SAS's litigation-financing business, and was publicly described as overseeing "the operations of SAS Asset Recovery in the Middle East." *Id*. ¶ 143 & n.35.
- SAS, which Dondero and Ellington owned 70% and 30%, operated out of Highland's offices with Highland's employees. Id. ¶¶ 21, 110 & n.31.

Defendants then object to the SAC's allegations made "on information and belief" and to its measured phrasing elsewhere. Doc. 69 at 60–61, 63. Allegations on information and belief are permissible under Rule 9(b) where "the facts pleaded in a complaint are peculiarly within the opposing party's knowledge," so long as they are not based "on speculation and conclusory allegations" and the complaint sets out the facts on which the belief rests. *Tuchman v. DSC Commc'ns Corp*., 14 F.3d 1061, 1068 (5th Cir. 1994). Here, the SAC meets that standard. Its statement that "it appears" Massand rendered no services to Highland, "[b]ased upon a review of information to date," SAC ¶ 142, reflects candor about what remains in Defendants' files, and it rests on the specific facts just described. *Id*. ¶¶ 141–143, 297. Likewise, the allegation that Dondero and Ellington directed the Grey Royale funds to themselves, *id*. ¶ 310, follows from facts pleaded without qualification: Ellington directed the escrow agent to wire the funds to a Cayman Islands shell company that he and Dondero owned, and he later told Highland's Tax Director that the missing money had paid "closing costs." *Id.* ¶¶ 147–148. What services Massand actually performed, and why the escrowed funds went to Grey Royale, are matters peculiarly within

Defendants' knowledge. The SAC identifies the fraud at issue in detail, with the supporting facts on which its beliefs rest.

Defendants also contend that the expense transfers challenged in Counts XXVIII and XXIX were ordinary-course reimbursements, because the SAC alleges that Dondero "routinely" sought reimbursements of more than $1 million a year. Doc. 69 at 61 (citing SAC ¶ 108). That reads the allegation backwards. Paragraph 108 of the SAC alleges that Dondero "funneled his own personal expenses through HCMLP." It also alleges that he had Highland employ staff whose only job was to manage his personal affairs, and that he used Highland's employees for his own entities and trusts without compensating Highland. SAC ¶ 108. A practice of charging personal expenses to the partnership is a reason to infer fraudulent intent, not a reason to presume the reimbursements were legitimate, and the timing reinforces this inference. The challenged transfers were made between October 2018 and October 15, 2019, the day before the Petition Date, while Dondero and Ellington "believed HCMLP would be forced to file for bankruptcy." *Id*. ¶¶ 346, 360(h). These transfers also include $318,893 to Ellington in the final seven weeks before the petition was filed. *Id*. ¶ 346. Whether particular payments reimbursed legitimate business expenses is also a fact question about the defendants' own records, information "peculiarly within the opposing party's knowledge." *Tuchman*, 14 F.3d at 1068. Defendants' cited cases are not to the contrary. Each involved a list of payments supported by a single conclusory sentence on value, and each was dismissed with leave to replead. *Faulkner v. Lone Star Brokering, LLC (In re Reagor-Dykes Motors, LP)*, 2021 Bankr. LEXIS 1643, at *10–12, *18–19 (Bankr. N.D. Tex. June 18, 2021); *Crescent Res. Litig. Tr. v. Nexen Pruet, LLC (In re Crescent Res., LLC)*, 2012 Bankr. LEXIS 287, at *25–27 (Bankr. W.D. Tex. Jan. 23, 2012). Here, the SAC alleges that the transfers went to insiders, were gratuitous, and paid personal expenses. SAC ¶¶ 108, 345, 355.

The SAC gives Defendants fair notice of the claims against them and the factual basis for the inference of actual intent. *See Life Partners*, 926 F.3d at 118. Defendants' demand for a more exhaustive catalog of every communication and every subsidiary transaction is not what Rule 9(b) requires. The intentional fraudulent-transfer counts state the circumstances of the transfers with the particularity the rule demands.

C. The SAC does not engage in improper group pleading.

Rule 9(b) does not require a plaintiff to allege the precise role of every participant in a scheme in which the defendants acted in concert when the complaint identifies the scheme, the transfers, and the defendants' participation in it. *Life Partners*, 926 F.3d at 119; *Janvey v. Alguire*, 846 F. Supp. 2d 662, 677 (N.D. Tex. 2012) (fraudulent-transfer allegations sufficient under Rule 9(b) where they included the time period of the transfers, details of the underlying scheme, and the amounts received).

Defendants' reliance on *Southland Securities Corp. v. INSpire Insurance Solutions, Inc*., 365 F.3d 353, 365 (5th Cir. 2004), Doc. 69 at 61, is misplaced. *Southland* was a securities-fraud case under the Private Securities Litigation Reform Act, which imposes requirements beyond ordinary Rule 9(b), and it refused to attribute a company's press releases and public statements to each of dozens of executives. This is a Bankruptcy Code avoidance action alleging a coordinated scheme among related entities controlled by a single person. And the SAC's allegations are defendant-specific: Dondero, the controlling person of Highland and the entity defendants, directed the transfers of the advisory contracts and cash into entities he controlled, SAC ¶¶ 12, 30, 100, 110–11; HCMFA received the Transferred Funds through the December 15, 2011 diversions; NexPoint later received the Highland Credit Strategies Fund; and specific cash transfers were made to or for the benefit of particular Defendants. *Id*. ¶¶ 245–48, 251–53.

D. Aiding-and-abetting and conspiracy are pled in identified transactions.

Defendants contend that the aiding-and-abetting and conspiracy counts fail because the underlying fiduciary-duty claims fail. Doc. 69 at 59. They also challenge the particularity of the allegations. Doc. 69 at 61–62. The SAC, however, pleads both theories through knowing participation in identified transactions.

Counts XV, XXX, and XXXI allege that certain defendants knowingly participated in Dondero's breaches of fiduciary duty by facilitating the diversions, and the transfers of Highland's advisory contracts and cash. SAC Counts XV, XXX, XXXI; ¶¶ 245–53, 258–61. Texas recognizes liability for knowing participation in a breach of fiduciary duty. *Kinzbach Tool Co. v. Corbett-Wallace Corp*., 160 S.W.2d 509, 514 (Tex. 1942). A defendant is liable where he knows of the fiduciary relationship and the breach, and participates in it. *Id*. ("It is settled as the law of this State that where a third party knowingly participates in the breach of the duty of a fiduciary, such third party becomes a joint tortfeasor with the fiduciary and is liable as such").

To state a claim for knowing participation in breach of fiduciary duty, a plaintiff must allege enough facts to show: "(1) the existence of a fiduciary duty owed by a third party to plaintiff; (2) the defendant knew of the fiduciary relationship; and (3) the defendant was aware of his participation in the third party's breach of its duty." *Straehla v. AL Global Servs., LLC*, 619 S.W.3d 795, 804 (Tex. App.—San Antonio 2020, pet. denied). Here the SAC clearly alleges, in detail, that the relevant Defendants knew of Dondero's control of Highland and of the related entities, and that they facilitated the transfers that stripped Highland of its contracts and cash. SAC ¶¶ 23–35, 245–53.

Count XVI, the civil conspiracy count, rests on the same allegations. It alleges that the defendants agreed to, and participated in, the scheme to divert Highland's advisory contracts and cash. SAC Count XVI; ¶¶ 258–59, 264, 266, 268, 272. The SAC identifies the transactions, the

roles of the Defendants, their participation in the transfers at issue, and Dondero's direction of them. That is all that is required. These are ancillary counts and they are not independently deficient under Rule 9(b) or Rule 12(b)(6). As to Get Good Trust, the SAC alleges that it is Dondero's trust for his descendants, SAC ¶ 17; that its trustee, Dondero's "closest friend" Scott, served as a "rubber-stamp for Dondero's self-interested schemes to siphon value from HCMLP" and was compensated with "business gifts" for his service as trustee of Get Good "in furtherance of the conspiracy," *id*. ¶ 271; that Highland's employees worked for it without compensation, including on transactions between Get Good and other Dondero entities, *id.* ¶ 108; and that it joined the conspiracy. *Id*. ¶¶ 268, 272, 274. Scott's knowledge as trustee is Get Good's, *Official Stanford Invs. Comm. v. Greenberg Traurig, LLP*, 2014 U.S. Dist. LEXIS 190621, at *28–29 & n.9 (N.D. Tex. Dec. 17, 2014), and Get Good's receipt of Highland's uncompensated services supports an inference of concerted action, *Int'l Bankers Life Ins. Co. v. Holloway*, 368 S.W.2d 567, 581–82 (Tex. 1963) (inference may be drawn "from enjoyment of the fruits of the transactions"). If the Court finds those factual allegations insufficient, HMIT requests leave to amend. *See* Part VIII.G.

E. Restitution, alter ego, conversion, and tortious interference claims are viable.

Defendants challenge the unjust-enrichment and money-had-and-received counts (Counts XXIII–XXV), the declaratory and alter-ego counts (Counts VI–XI), and the conversion count (Count XXII). Doc. 69 at 32–35, 65–69. None of these challenges warrants dismissal.

1. Unjust enrichment and money had and received.

First, Texas recognizes recovery for unjust enrichment where one party "has obtained a benefit from another by fraud, duress, or the taking of an undue advantage." *Heldenfels Bros., Inc. v. City of Corpus Christi*, 832 S.W.2d 39, 41 (Tex. 1992). Money had and received is "equitable in nature" and asks only whether the defendant holds money that, "in equity and good conscience," belongs to the plaintiff. *Staats v. Miller*, 243 S.W.2d 686, 687–88 (Tex. 1951); *Edwards v. Mid-*

Continent Office Distribs., L.P., 252 S.W.3d 833, 837 (Tex. App.—Dallas 2008, pet. denied). Defendants themselves treat the two theories together. Doc. 69 at 67 (heading: "Unjust Enrichment or Money Had and Received"). Whatever label is used, the SAC pleads the elements: Defendants obtained Highland's money and business through breaches of fiduciary duty, fraudulent transfers, and the taking of undue advantage, and they hold value that belongs to Highland. SAC ¶¶ 314–317, 322–324, 331–334. Defendants rely on *Ranieri v. Advocare Int'l, L.P.*, 336 F. Supp. 3d 701, 723 (N.D. Tex. 2018), and *Midwestern Cattle Mktg., L.L.C. v. Legend Bank, N.A.*, 999 F.3d 970 (5th Cir. 2021). Doc. 69 at 67. *Ranieri* dismissed a claim pleaded only as unjust enrichment. 336 F. Supp. 3d at 723. Counts XXIII through XXV also plead money had and received, which *Midwestern Cattle* recognizes as an independent claim under Texas law. 999 F.3d at 972.

Second, the express contract rule does not apply. For purposes of these claims, the SAC alleges that "[t]here was no valid express contract governing the subject matter of this dispute." SAC ¶¶ 318, 325, 333. That allegation should be taken as true. Defendants have not identified any contract provision governing conduct like:

- the diversion of $2.98 million in escrowed funds to Grey Royale, *id*. ¶¶ 147, 316, 323;
- the benefits Ellington and Leventon obtained from Sentinel and, through Tall Pine, from other Dondero entities, not from Highland under their compensation arrangements, *id*. ¶¶ 66–67, 153, 322–324; or
- the use of Highland's employees and business by NexPoint and HCMFA beyond anything their agreements provided, *id*. ¶¶ 43, 52, 329, 331.

To the extent Defendants contend that particular agreements covered particular transfers, that is a factual dispute about the scope and validity of agreements Dondero signed on both sides of the transactions. *Id*. ¶ 110. HMIT may also plead restitution in the alternative. FED. R. CIV. P. 8(d)(2)–(3).

Third, the SAC identifies the money. It alleges specific transfers by date, amount, and recipient, including the Grey Royale diversion and the payments through Sentinel and Tall Pine.

SAC ¶¶ 66–67, 147, 153. For Count XXV, the SAC identifies the more than $120 million in advisory and administrative fees NexPoint earned, and the fees HCMFA collected, using Highland's employees without fairly compensating Highland. *Id*. ¶¶ 49, 52, 329–32. And Defendants' demand for fraud-level particularity on these counts, Doc. 69 at 63, is one they reject in state court. *See* supra n.6.

2. The declaratory and alter ego counts.

Defendants next argue that Counts VI and VIII–XI seek advisory declarations of liability for unspecified debts, and that alter ego is not an independent cause of action. Doc. 69 at 32–35. They are wrong. The Delaware Supreme Court has specifically stated that an alter ago claim may be independently asserted. *In re Verizon Ins. Coverage Appeals*, 222 A.3d 566, 577 (Del. 2019) ("unjust enrichment and alter ego claims are common-law claims"). In any event, alter ego is also "a means of imposing liability on an underlying cause of action," *Peacock v. Thomas*, 516 U.S. 349, 354 (1996).The underlying causes of action are the avoidance, fiduciary-duty, and related claims pleaded in the SAC. Counts VII and IX–XI seek to hold Dondero responsible for Strand's liability on those claims, and to hold Dugaboy, NexPoint, and HCMFA responsible for Dondero's, because Dondero used those entities as instruments of the same scheme. SAC ¶¶ 204–208, 220–242. A claim for alter-ego liability tied to claims pending in the same action is neither abstract nor advisory, and it is not subject to dismissal while the underlying claims remain. *Wilson v. Davis*, 305 S.W.3d 57, 68 (Tex. App.—Houston [1st Dist.] 2009, no pet.); *Skaggs v. 4907 Corp*., No. 02-24-00382-CV, 2025 Tex. App. LEXIS 3862, at *7–8 (Tex. App.—Fort Worth June 5, 2025, no pet.).

Defendants also contend that Delaware law requires fraud or injustice arising from misuse of the corporate form, separate from the underlying claims, and that NexPoint's and HCMFA's revenues show they were legitimate businesses. Doc. 69 at 62–63 (citing *PXP Producing Co. v.*

MRC Permian Co., 342 A.3d 402, 418–20 (Del. 2024)). But the SAC alleges exactly that kind of misuse as required under Delaware law. The injustice it alleges is not merely the underlying breaches; it is that Dondero created and used these entities as the means of placing Highland's business and profits beyond its creditors' reach and to wrongfully benefit themselves. *See Manichaean Capital, LLC v. Exela Techs., Inc*., 251 A.3d 694, 708–09, 717 (Del. Ch. 2021) (allegations that affiliated entities were used to move value beyond a creditor's reach adequately pleaded the fraud or injustice required to disregard the entity form). Dondero created NexPoint in 2012 "to siphon profits from HCMLP in order to evade HCMLP's creditors," SAC ¶ 41, and he created HCMFA to replace Highland as manager of its funds "in a manner similarly designed to ensure that the profits generated by the business would not be available to HCMLP's litigation creditors." *Id*. ¶ 50. The entities' separateness was the instrument of that injustice. They had no employees of their own for years, used Highland's employees and offices, and operated under agreements Dondero signed on both sides. *Id*. ¶¶ 42, 110, 229–230, 238–239. Strand, the general partner through which Dondero controlled Highland, never held a board meeting. *Id*. ¶¶ 100–101, 206. Nor do NexPoint's and HCMFA's revenues show that they were legitimate independent businesses. The revenues were the point of the scheme: they were fees earned by Highland's employees doing Highland's work, redirected to entities Dondero owned. *Id*. ¶¶ 42, 49, 51–52. Again, whether the entities were operated as a single economic unit with Dondero, and whether he used their separateness to perpetrate the resulting injustice, are fact questions that cannot be resolved on the pleadings.

Counts VI and VIII do not seek an advisory opinion either. HMIT does not seek declarations in favor of persons who are not before the Court, or as to liabilities that are not at issue in this action. Count VI rests on § 17-403(b) of DRULPA, which provides not only that a general partner is liable to third parties, but also that, "[e]xcept as provided in this chapter or in the

partnership agreement, a general partner of a limited partnership has the liabilities of a partner in a partnership that is governed by the Delaware Uniform Partnership Law ... to the partnership and to the other partners." 6 Del. C. § 17-403(b); SAC ¶ 199. HMIT, which now owns Highland's claims, invokes that provision to establish Strand's liability, as general partner, to Highland on the claims pleaded in this action, including Counts IV, V, and XIV. So read, Count VI presents a concrete controversy between parties now before the Court. Count VIII rests on the allegations that Dondero operated Strand and Highland as a single economic unit, SAC ¶¶ 210–19, allegations that also form the predicate for Count IX. *Id.* ¶ 221.

The remedy for an overbroad prayer is to tailor the declaration, not to dismiss the claim. A final judgment "should grant the relief to which each party is entitled, even if the party has not demanded that relief in its pleadings," FED. R. CIV. P. 54(c), and district courts have broad discretion in determining whether and how to entertain a request for declaratory relief. *Wilton v. Seven Falls Co.*, 515 U.S. 277, 286–88 (1995). The declaration Defendants describe in *Orix Credit All., Inc. v. Wolfe*, 212 F.3d 891, 896–97 (5th Cir. 2000), would have barred an unknown class of future claims. Doc. 69 at 33. HMIT seeks nothing of the kind. If the Court concludes that Counts VI or VIII should be limited more precisely to the claims in this action, HMIT requests leave to amend them accordingly. Alternatively, any dismissal should be without prejudice to HMIT's right to seek general-partner or alter-ego liability as a remedy on any judgment it obtains. *See Peacock*, 516 U.S. at 354.

3. Conversion.

Defendants argue that money can be converted only if it is specifically identifiable. Doc. 69 at 65–67. Count XXII meets that test. It concerns $2,977,245.15 in sale proceeds that were held in escrow for Highland. Those proceeds were "held for safekeeping," "intended to be kept segregated," and constituted "specific and identifiable money, in the form they were received."

SAC ¶¶ 145–147, 307–309. Defendants' argument that the funds were delivered to counsel, as distinguished from Dondero or Ellington, misses the point because counsel were serving as the escrow agent. SAC ¶¶ 145–147. Ellington directed Wick Phillips to wire the full amount to a Cayman Islands account for Grey Royale, a company he and Dondero owned and controlled, and the SAC alleges that both directed the funds to themselves. *Id*. ¶¶ 147, 310. Under Texas law, money may be converted when it is "(1) delivered for safekeeping; (2) intended to be kept segregated; (3) substantially in the form in which it is received or an intact fund; and (4) not the subject of a title claim by the keeper." *TXNB*, 483 F.3d at 308; *see Houston Nat'l Bank v. Biber*, 613 S.W.2d 771, 774 (Tex. App.—Houston [14th Dist.] 1981, writ ref'd n.r.e.) (conversion lies "when [the money's] identification is possible"). Here, the SAC pleads each element. SAC ¶ 309. This is not a case where a plaintiff failed to allege segregated, identifiable funds. The funds were a single identified sum held by an escrow agent for Highland and wired out intact. *Id.* ¶¶ 146–147, 310. Nor was a demand required. Demand and refusal are "not necessary if the other evidence establishes an act of conversion." *Presley v. Cooper*, 284 S.W.2d 138, 141 (Tex. 1955). Ellington's direction to wire the escrowed fund offshore is that act, and the SAC traces the fund from the escrow account to Grey Royale. SAC ¶¶ 147, 310.

4. Tortious interference.

Defendants argue that LPA Article 4.1(f) authorized the conduct alleged in Count XVII and that the SAC pleads no independently tortious act. Doc. 69 at 64–65. As shown in Part VI.B, however, Article 4.1(f) does not authorize the use of Highland's own contracts, employees, and resources to build a competitor. And the plaintiff need only show that the defendant's conduct "would be actionable under a recognized tort." *Wal-Mart Stores, Inc. v. Sturges*, 52 S.W.3d 711, 726 (Tex. 2001). The SAC alleges that the diversion was carried out through fiduciary breaches

and fraudulent transfers, including the continuing use of Highland's employees and resources for NexPoint and HCMFA. SAC ¶¶ 245–53, 278; *see* Part IV.C.

F. The preference count states a claim.

Defendants argue that Count XXVII, which seeks to avoid $4,753,911 in transfers to Dondero and $318,893 in transfers to Ellington made within one year before the Petition Date, SAC ¶¶ 345–46, must be dismissed because the Complaint does not plead "reasonable due diligence" under § 547(b), does not plead around the ordinary-course defense, and reports the transfers "totaled by month," so that some might fall below the threshold of § 547(c)(9). Doc. 69 at 68–69. None of these criticisms are valid.

Due diligence. Section 547(b) provides that the trustee may avoid a preferential transfer "based on reasonable due diligence in the circumstances of the case and taking into account a party's known or reasonably knowable affirmative defenses under subsection (c)." 11 U.S.C. § 547(b). In *In re Trailhead Eng'g LLC*, the Bankruptcy Court for the Southern District of Texas observed that the defendant cited no authority "actually stating that the failure to affirmatively allege diligence leads to dismissal," noted that the statute calls for diligence "in the circumstances of the case," and denied dismissal because the complaint showed the trustee's review of the debtor's records and mapped the transactions at issue. *Sommers v. Anixter, Inc. (In re Trailhead Eng'g LLC)*, 2020 Bankr. LEXIS 3547, at *19–20 (Bankr. S.D. Tex. Dec. 21, 2020). Here, there is no need to plead due diligence as a condition precedent because the SAC clearly reflects the diligence the statute contemplates. It identifies each of the twenty-four One-Year Transfers by date, transferee, and amount; separates the $3,750,000 March 28, 2019 Repayment Transfer from the expense transfers; and pleads that each transfer was made to an insider, on account of antecedent debt, while Highland was insolvent. SAC ¶¶ 345–49. It also pleads the facts bearing on the § 547(c) defenses, including that Dondero "funneled his own personal expenses through

HCMLP." *Id.* ¶ 108. If the Court concludes that a more express allegation of diligence is nonetheless required, HMIT requests leave to amend. *See* Part VIII.G.

Ordinary course. Nor must a preference plaintiff plead around § 547(c)(2). The ordinary-course exception is an affirmative defense on which the transferee bears the burden of proof. 11 U.S.C. § 547(g). The statute's reference to "known or reasonably knowable affirmative defenses" requires the plaintiff to take such defenses into account before suing, not to negate them in the complaint, and the defense does not appear on the face of the SAC. The largest transfer is a single $3,750,000 repayment to Highland's controlling principal, made less than seven months before the Petition Date. SAC ¶ 346. Defendants point to the allegation that Dondero "routinely" sought reimbursements exceeding $1 million a year, Doc. 69 at 69 (citing SAC ¶ 108), but the same sentence alleges that he did so to "funnel[] his own personal expenses through HCMLP." SAC ¶ 108. Whether a particular payment was made in the ordinary course of business is a fact question.

The de minimis threshold. Defendants' § 547(c)(9) argument also fails on the face of the SAC. Section 547(c)(9) is an affirmative defense on which Defendants bear the burden. 11 U.S.C. § 547(g). Here, the SAC does not allege the transfers "totaled by month," as Defendants claim. Doc. 69 at 69. Rather, it lists each transfer individually by date, and several months contain more than one. SAC ¶ 346 (e.g., January 15 and January 31, 2019; August 15 and August 30, 2019). Every one of the twenty-four listed transfers exceeds $6,825; the smallest is $7,164. *Id.* Nothing in the SAC suggests that any challenged transfer falls below the threshold, and if one were later shown to do so, the remedy would be to exclude that transfer, not to dismiss the count.

Alternative pleading. Finally, Count XXVII is consistent with Counts XXVIII and XXIX, which challenge the same expense transfers as fraudulent "[t]o the extent" they did not reimburse valid expenses. SAC ¶¶ 353, 358. HMIT may plead in the alternative. FED. R. CIV. P. 8(d)(2)–(3). To the extent a transfer reimbursed a legitimate business expense, it satisfied an antecedent debt

to an insider and is avoidable as a preference; to the extent the transfer paid personal expenses Highland did not owe, it was made for less than reasonably equivalent value and is avoidable as a fraudulent transfer.

G. If the Court finds any count deficient, leave to amend should be granted.

Lastly, if the Court were to find any count deficient, dismissal of that count should be without prejudice and with leave to amend. Leave to amend should be freely given when justice so requires. FED. R. CIV. P. 15(a)(2). The Court must dismiss with leave to amend "unless the defect is simply incurable, or the plaintiff has failed to plead with particularity after being afforded repeated opportunities to do so." *Young v. U.S. Postal Serv. ex rel. Donahoe*, 620 F. App'x 241, 245 (5th Cir. 2015) (quoting *Hart v. Bayer Corp.*, 199 F.3d 239, 247 n.6 (5th Cir. 2000)). The presumption is that courts should dismiss a complaint only after "affording every opportunity" to the plaintiff to state a claim unless it would be futile. *Hitt v. City of Pasadena*, 561 F.2d 606, 608 (5th Cir. 1977) (per curiam).

Here, this is HMIT's first opportunity, as the substituted plaintiff, to respond to a motion to dismiss in this Court. The SAC was filed to reflect the assignment and substitution already approved by the Bankruptcy Court as the Court directed. It was not a response to the present Motion. Any pleading shortcoming identified by the Court can be cured by amendment, and Defendants have not shown that amendment would be futile. Accordingly, the Motion should be denied but, in the alternative, any dismissal should be without prejudice and with leave to amend.

CONCLUSION

For the reasons stated, the Court should deny the Motion to Dismiss. Alternatively, the Court should grant HMIT leave to amend any count it finds deficient.

Respectfully submitted,

/s/ *Sawnie A. McEntire*

SAWNIE A. MCENTIRE
Texas Bar No. 13590100
MICHAEL V. MARCONI
Texas Bar No. 00784524

PARSONS MCENTIRE MCCLEARY PLLC
1700 Pacific Avenue, Suite 4400
Dallas, Texas 75201
(214) 237-4300
(214) 237-4340 [Fax]
smcentire@pmmlaw.com
mmarconi@pmmlaw.com

Attorneys for Plaintiff Hunter Mountain Investment Trust

CERTIFICATE OF SERVICE

On November 12, 2026, I electronically submitted the foregoing document with the clerk of court for the U.S. District Court, Northern District of Texas, using the electronic case filing system of the court. I hereby certify that I have served all parties electronically or by another manner authorized by Federal Rule of Civil Procedure 5(b)(2).

/s/ *Sawnie A. McEntire*

SAWNIE A. MCENTIRE

EXHIBIT A

Defendants' Dismissal Arguments and the Parts of HMIT's Response That Address Them

This table reproduces, count by count and in Defendants' order, each of the 144 dismissal arguments listed in the Table of Counts in Defendants' Memorandum of Law (Doc. 69 at xii–xvii), and identifies the Part of HMIT's Response that answers it. Part I of the Response sets out the standards that govern these arguments, and Part VIII.G addresses leave to amend.

No.	Count / Moving Defendant(s)	Defendants' Dismissal Argument (Doc. 69 Section and Pages)	Addressed in HMIT's Response
1	**Count I:** Constructive Fraudulent Transfers—HCMLP Distributions *Dondero, Dugaboy, Strand*	(a) No subject matter jurisdiction [§IV.A, pp. 12–23]	Parts II.A–E
2		(b) Abstention (§ 544(b)) [§IV.A.3, pp. 21–23]	Part II.G
3		(c) Barred by 2-year limitations period (§ 548) and 4-year TUFTA statute of repose [§V.A.3, pp. 38–41]	Parts IV.A, IV.B, IV.E
4	**Count II:** Intentional Fraudulent Transfers—HCMLP Distributions *Dondero, Dugaboy, Strand*	(a) No subject matter jurisdiction [§IV.A, pp. 12–23]	Parts II.A–E
5		(b) Abstention (§ 544(b)) [§IV.A.3, pp. 21–23]	Part II.G
6		(c) Barred by 2-year limitations period (§ 548) and 4-year TUFTA statute of repose [§V.A.3, pp. 38–41]	Parts IV.A, IV.B, IV.D.4, IV.E
7		(d) Failure to plead with particularity (Rule 9(b)) [§V.D, pp. 59–64]	Parts I.C, VIII.B–C
8	**Count III:** Illegal Distributions (DRULPA) *Dondero, Dugaboy, Strand*	(a) No subject matter jurisdiction [§IV.A, pp. 12–23]	Parts II.C–F
9		(b) No standing / Plan reservation [§IV.B.3, pp. 30–32]	Part III.C
10	**Count IV:** Breach of Fiduciary Duty—Lifeboat Scheme *Dondero, Strand*	(a) No subject matter jurisdiction [§IV.A, pp. 12–23]	Parts II.C–F
11		(b) No standing (fiduciary claims) [§IV.B.1, pp. 24–28]	Parts III.B, VII
12		(c) Partially barred by 4-year Texas limitations period [§V.A.1, pp. 36–38]	Parts IV.A, IV.C, IV.D.1–3
13		(d) Res judicata [§V.B, pp. 44–47]	Parts V.A–B
14		(e) LPA displaces duties [§V.C.1, pp. 48–50]	Parts VI, VI.A
15		(f) LPA authorizes conduct [§V.C.2, pp. 50–55]	Parts VI.B–C
16		(g) Failure to plead with particularity (Rule 9(b)) [§V.D, pp. 59–64]	Parts VI.B, VIII, VIII.C
17	**Count V:** Breach of Fiduciary Duty—Third-Party Liabilities *Dondero, Strand; Ellington, Leventon*	(a) No subject matter jurisdiction [§IV.A, pp. 12–23]	Parts II.C–F
18		(b) No standing (fiduciary claims) [§IV.B.1, pp. 24–28]	Parts III.B, VII
19		(c) Partially barred by 4-year Texas limitations period [§V.A.1, pp. 36–38]	Parts IV.A, IV.D.1–3
20		(d) LPA displaces duties [§V.C.1, pp. 48–50]	Parts VI, VI.A
21		(e) LPA authorizes conduct [§V.C.2, pp. 50–55]	Parts VI.B–C

No.	Count / Moving Defendant(s)	Defendants' Dismissal Argument (Doc. 69 Section and Pages)	Addressed in HMIT's Response
22		(f) Failure to plead with particularity (Rule 9(b)) [§V.D, pp. 59–64]	Parts VI.B, VIII, VIII.C
23		(g) Leventon not an "insider" / claims not assigned (Ellington/Leventon) [§IV.B.2, pp. 28–30]	Part III.B
24		(h) Barred by 2-year Texas limitations period (Ellington/Leventon) [§V.A.1, pp. 36–38]	Parts IV.A, VII.A–B
25		(i) No fiduciary duties (Ellington/Leventon) [§V.C.3, pp. 55–59]	Parts VII.A–C
26		(j) Anti-fracturing rule (Ellington/Leventon) [§V.C.3, pp. 55–59]	Part VII.B
27	**Count VI:** Declaratory Judgment—Strand Liable as General Partner *Strand*	(a) No subject matter jurisdiction [§IV.A, pp. 12–23]	Parts II.C–F
28		(b) Seeks improper advisory opinion [§IV.C.1, pp. 32–33]	Part VIII.E.2
29	**Count VII:** Declaratory Judgment—Dondero Alter Ego of Strand *Dondero*	(a) No subject matter jurisdiction [§IV.A, pp. 12–23]	Parts II.C–F
30		(b) Universal alter ego improper [§IV.C.2, pp. 33–35]	Part VIII.E.2
31		(c) Alter ego not an independent cause of action [§IV.C.2, pp. 33–35]	Part VIII.E.2
32		(d) Failure to plead with particularity (Rule 9(b)) [§V.D, pp. 59–64]	Parts VIII, VIII.E.2
33	**Count VIII:** Declaratory Judgment—Dondero & Strand Alter Egos of HCMLP *Dondero, Strand*	(a) No subject matter jurisdiction [§IV.A, pp. 12–23]	Parts II.C–F
34		(b) Seeks improper advisory opinion [§IV.C.1, pp. 32–33]	Part VIII.E.2
35		(c) Universal alter ego improper [§IV.C.2, pp. 33–35]	Part VIII.E.2
36		(d) Alter ego not an independent cause of action [§IV.C.2, pp. 33–35]	Part VIII.E.2
37		(e) Failure to plead with particularity (Rule 9(b)) [§V.D, pp. 59–64]	Parts VIII, VIII.E.2
38	**Count IX:** Declaratory Judgment—Dugaboy Alter Ego *Dugaboy*	(a) No subject matter jurisdiction [§IV.A, pp. 12–23]	Parts II.C–F
39		(b) Seeks improper advisory opinion [§IV.C.1, pp. 32–33]	Part VIII.E.2
40		(c) Universal alter ego improper [§IV.C.2, pp. 33–35]	Part VIII.E.2
41		(d) Alter ego not an independent cause of action [§IV.C.2, pp. 33–35]	Part VIII.E.2
42		(e) Failure to plead with particularity (Rule 9(b)) [§V.D, pp. 59–64]	Parts VIII, VIII.E.2
43	**Count X:** Declaratory Judgment—NexPoint Alter Ego *NexPoint*	(a) No subject matter jurisdiction [§IV.A, pp. 12–23]	Parts II.C–F
44		(b) Seeks improper advisory opinion [§IV.C.1, pp. 32–33]	Part VIII.E.2

No.	Count / Moving Defendant(s)	Defendants' Dismissal Argument (Doc. 69 Section and Pages)	Addressed in HMIT's Response
45		(c) Universal alter ego improper [§IV.C.2, pp. 33–35]	Part VIII.E.2
46		(d) Alter ego not an independent cause of action [§IV.C.2, pp. 33–35]	Part VIII.E.2
47		(e) Res judicata [§V.B, pp. 44–47]	Parts V.A–B
48		(f) Failure to plead with particularity (Rule 9(b)) [§V.D, pp. 59–64]	Parts VIII, VIII.E.2
49	**Count XI:** Declaratory Judgment—HCMFA Alter Ego *HCMFA*	(a) No subject matter jurisdiction [§IV.A, pp. 12–23]	Parts II.C–F
50		(b) Seeks improper advisory opinion [§IV.C.1, pp. 32–33]	Part VIII.E.2
51		(c) Universal alter ego improper [§IV.C.2, pp. 33–35]	Part VIII.E.2
52		(d) Alter ego not an independent cause of action [§IV.C.2, pp. 33–35]	Part VIII.E.2
53		(e) Res judicata [§V.B, pp. 44–47]	Parts V.A–B
54		(f) Failure to plead with particularity (Rule 9(b)) [§V.D, pp. 59–64]	Parts VIII, VIII.E.2
55	**Count XII:** Constructive Fraudulent Transfers—Management Agreements *HCMFA, NexPoint*	(a) No subject matter jurisdiction [§IV.A, pp. 12–23]	Parts II.A–E
56		(b) Abstention (§ 544(b)) [§IV.A.3, pp. 21–23]	Part II.G
57		(c) Barred by 4-year TUFTA statute of repose [§V.A.3, pp. 38–41]	Parts IV.C, IV.E
58		(d) Res judicata [§V.B, pp. 44–47]	Parts V.A–B
59	**Count XIII:** Intentional Fraudulent Transfers—Management Agreements *HCMFA, NexPoint*	(a) No subject matter jurisdiction [§IV.A, pp. 12–23]	Parts II.A–E
60		(b) Abstention (§ 544(b)) [§IV.A.3, pp. 21–23]	Part II.G
61		(c) Barred by 4-year TUFTA statute of repose [§V.A.3, pp. 38–41]	Parts IV.C, IV.D.4, IV.E
62		(d) Res judicata [§V.B, pp. 44–47]	Parts V.A–B
63		(e) Failure to plead with particularity (Rule 9(b)) [§V.D, pp. 59–64]	Parts I.C, VIII.B–C
64	**Count XIV:** Breach of Fiduciary Duty—Fraudulent Transfers & Schemes *Dondero, Strand, Ellington*	(a) No subject matter jurisdiction [§IV.A, pp. 12–23]	Parts II.C–F
65		(b) Partially barred by 4-year Texas limitations period [§V.A.1, pp. 36–38]	Parts IV.A, IV.D.1–3
66		(c) No standing [§IV.B.1, pp. 24–28]	Parts III.B, VII
67		(d) LPA displaces duties [§V.C.1, pp. 48–50]	Parts VI, VI.A
68		(e) LPA authorizes conduct [§V.C.2, pp. 50–55]	Parts VI.B–C
69		(f) Failure to plead with particularity (Rule 9(b)) [§V.D, pp. 59–64]	Parts VI.B, VIII, VIII.C
70		(g) Barred by 2-year limitations period (Ellington) [§V.A.1, pp. 36–38]	Parts IV.A, VII.A–B
71		(h) No fiduciary duties (Ellington) [§V.C.3, pp. 55–59]	Parts VII.A–C

No.	Count / Moving Defendant(s)	Defendants' Dismissal Argument (Doc. 69 Section and Pages)	Addressed in HMIT's Response
72	**Count XV:** Aiding & Abetting Breach of Fiduciary Duty *NexPoint, HCMFA, Get Good Trust*	(a) No subject matter jurisdiction [§IV.A, pp. 12–23]	Parts II.C–F
73		(b) Partially barred by 4-year Texas limitations period [§V.A.1, pp. 36–38]	Parts IV.A, IV.C, IV.D
74		(c) Res judicata [§V.B, pp. 44–47]	Parts V.A–B
75		(d) No standing / Plan reservation [§IV.B.3, pp. 30–32]	Part III.C
76		(e) Underlying fiduciary duty claims fail [§V.C, pp. 47–59]	Parts VI, VII, VIII.D
77		(f) Failure to plead with particularity (Rule 9(b)) / group pleading [§V.D, pp. 59–64]	Parts VIII.C–D
78	**Count XVI:** Civil Conspiracy *Dondero, Ellington, Leventon, NexPoint, HCMFA, Get Good Trust*	(a) No subject matter jurisdiction [§IV.A, pp. 12–23]	Parts II.C–F
79		(b) No standing / Plan reservation [§IV.B.3, pp. 30–32]	Part III.C
80		(c) Partially barred by 4-year Texas limitations period [§V.A.1, pp. 36–38]	Parts IV.A, IV.C, IV.D
81		(d) Underlying fiduciary duty claims fail [§V.C, pp. 47–59]	Parts VI, VII, VIII.D
82		(e) No meeting of the minds [§V.D, pp. 59–64]	Part VIII.D
83		(f) Failure to plead with particularity (Rule 9(b)) / group pleading [§V.D, pp. 59–64]	Parts VIII.C–D
84		(g) Leventon not an "insider" / claims not assigned (Ellington/Leventon) [§IV.B.2, pp. 28–30]	Part III.B
85		(h) Barred by 2-year Texas limitations period (Ellington/Leventon) [§V.A.1, pp. 36–38]	Parts IV.A, VII.A–B
86		(i) No fiduciary duties (Ellington/Leventon) [§V.C.3, pp. 55–59]	Parts VII.A–C
87	**Count XVII:** Tortious Interference with Prospective Business Relations *Dondero, NexPoint, HCMFA*	(a) No subject matter jurisdiction [§IV.A, pp. 12–23]	Parts II.C–F
88		(b) Barred by 2-year Texas limitations period [§V.A.2, p. 38]	Part IV.C
89		(c) Res judicata [§V.B, pp. 44–47]	Parts V.A–B
90		(d) Failure to plead with particularity (Rule 9(b)) [§V.D, pp. 59–64]	Part VIII
91		(e) LPA precludes claim / no improper conduct [§V.E, pp. 64–65]	Parts VI.B, VIII.E.4
92	**Count XX:** Constructive Fraudulent Transfers—Massand *Dondero, Ellington*	(a) No subject matter jurisdiction [§IV.A, pp. 12–23]	Parts II.A–E
93		(b) Abstention (§ 544(b)) [§IV.A.3, pp. 21–23]	Part II.G
94		(c) Barred by 4-year TUFTA statute of repose [§V.A.3, pp. 38–41]	Parts IV.A, IV.B
95	**Count XXI:** Intentional Fraudulent Transfers—Massand	(a) No subject matter jurisdiction [§IV.A, pp. 12–23]	Parts II.A–E
96		(b) Abstention (§ 544(b)) [§IV.A.3, pp. 21–23]	Part II.G

No.	Count / Moving Defendant(s)	Defendants' Dismissal Argument (Doc. 69 Section and Pages)	Addressed in HMIT's Response
97	*Dondero, Ellington*	(c) Barred by 4-year TUFTA statute of repose [§V.A.3, pp. 38–41]	Parts IV.A, IV.B
98		(d) Failure to plead with particularity (Rule 9(b)) [§V.D, pp. 59–64]	Parts I.C, VIII.B–C
99	**Count XXII:** Conversion *Dondero, Ellington*	(a) No subject matter jurisdiction [§IV.A, pp. 12–23]	Parts II.C–F
100		(b) Fails to state a claim (money) / not traceable [§V.F, pp. 65–67]	Part VIII.E.3
101		(c) Failure to plead with particularity (Rule 9(b)) [§V.D, pp. 59–64]	Part VIII
102		(d) Failure to plead required elements [§V.F, pp. 65–67]	Part VIII.E.3
103	**Count XXIII:** Unjust Enrichment / Money Had & Received *Dondero*	(a) No subject matter jurisdiction [§IV.A, pp. 12–23]	Parts II.C–F
104		(b) No standing / Plan reservation [§IV.B.3, pp. 30–32]	Part III.C
105		(c) Partially barred by 2-year Texas limitations period [§V.A.2, p. 38]	Parts IV.A, IV.D
106		(d) Res judicata [§V.B, pp. 44–47]	Parts V.A–B
107		(e) Failure to plead with particularity (Rule 9(b)) [§V.D, pp. 59–64]	Parts VIII, VIII.E.1
108		(f) Not an independent cause of action [§V.G, pp. 67–68]	Part VIII.E.1
109		(g) Express contracts govern [§V.G, pp. 67–68]	Part VIII.E.1
110		(h) No specific money [§V.G, pp. 67–68]	Part VIII.E.1
111	**Count XXIV:** Unjust Enrichment / Money Had & Received *Ellington, Leventon*	(a) No subject matter jurisdiction [§IV.A, pp. 12–23]	Parts II.C–F
112		(b) Leventon not an "insider" / claims not assigned [§IV.B.2, pp. 28–30]	Part III.B
113		(c) No standing / Plan reservation [§IV.B.3, pp. 30–32]	Part III.C
114		(d) Partially barred by 2-year Texas limitations period [§V.A.2, p. 38]	Parts IV.A, IV.D, VII
115		(e) Failure to plead with particularity (Rule 9(b)) [§V.D, pp. 59–64]	Parts VIII, VIII.E.1
116		(f) Not an independent cause of action [§V.G, pp. 67–68]	Part VIII.E.1
117		(g) Employment agreements govern [§V.G, pp. 67–68]	Part VIII.E.1
118		(h) No specific money [§V.G, pp. 67–68]	Part VIII.E.1
119	**Count XXV:** Unjust Enrichment / Money Had & Received *NexPoint, HCMFA*	(a) No subject matter jurisdiction [§IV.A, pp. 12–23]	Parts II.C–F
120		(b) No standing / Plan reservation [§IV.B.3, pp. 30–32]	Part III.C
121		(c) Partially barred by 2-year Texas limitations period [§V.A.2, p. 38]	Parts IV.C, IV.D
122		(d) Res judicata [§V.B, pp. 44–47]	Parts V.A–B

No.	Count / Moving Defendant(s)	Defendants' Dismissal Argument (Doc. 69 Section and Pages)	Addressed in HMIT's Response
123		(e) Failure to plead with particularity (Rule 9(b)) [§V.D, pp. 59–64]	Parts VIII, VIII.E.1
124		(f) Not an independent cause of action [§V.G, pp. 67–68]	Part VIII.E.1
125		(g) Agreements govern [§V.G, pp. 67–68]	Part VIII.E.1
126		(h) No specific money [§V.G, pp. 67–68]	Part VIII.E.1
127	**Count XXVII:** Preferential Transfers (§§ 547, 550) *Dondero, Ellington*	(a) No due diligence / conditions precedent [§V.H, pp. 68–69]	Part VIII.F
128		(b) De minimis (§ 547(c)(9)) [§V.H, pp. 68–69]	Part VIII.F
129	**Count XXVIII:** Constructive Fraudulent Transfers—Expenses *Dondero, Ellington*	(a) Abstention (§ 544(b)) [§IV.A.3, pp. 21–23]	Part II.G
130		(b) Legitimate reimbursements [§V.I, pp. 69–70]	Parts VIII.B, VIII.F
131	**Count XXIX:** Intentional Fraudulent Transfers—Expenses *Dondero, Ellington*	(a) Abstention (§ 544(b)) [§IV.A.3, pp. 21–23]	Part II.G
132		(b) Failure to plead with particularity (Rule 9(b)) [§V.D, pp. 59–64]	Parts I.C, VIII.B–C
133		(c) Legitimate reimbursements [§V.I, pp. 69–70]	Parts VIII.B, VIII.F
134	**Count XXX:** Aiding & Abetting Breach of Fiduciary Duty—HCMLP Liabilities *Ellington, Leventon*	(a) No subject matter jurisdiction [§IV.A, pp. 12–23]	Parts II.C–F
135		(b) Leventon not an "insider" / claims not assigned [§IV.B.2, pp. 28–30]	Part III.B
136		(c) No standing / Plan reservation [§IV.B.3, pp. 30–32]	Part III.C
137		(d) Barred by 2-year Texas limitations period [§V.A.1, pp. 36–38]	Parts IV.A, VII.A–B
138		(e) Underlying fiduciary duty claims fail [§V.C, pp. 47–59]	Parts VI, VII, VIII.D
139		(f) Failure to plead with particularity (Rule 9(b)) / group pleading [§V.D, pp. 59–64]	Parts VIII.C–D
140	**Count XXXI:** Aiding & Abetting Breach of Fiduciary Duty—Fraudulent Transfers *Ellington*	(a) No subject matter jurisdiction [§IV.A, pp. 12–23]	Parts II.C–F
141		(b) No standing / Plan reservation [§IV.B.3, pp. 30–32]	Part III.C
142		(c) Barred by 2-year Texas limitations period [§V.A.1, pp. 36–38]	Parts IV.A, VII.A–B
143		(d) Underlying fiduciary duty claims fail [§V.C, pp. 47–59]	Parts VI, VII, VIII.D
144		(e) Failure to plead with particularity (Rule 9(b)) / group pleading [§V.D, pp. 59–64]	Parts VIII.C–D

Total: 28 counts; 144 dismissal arguments; each addressed in HMIT's Response.

Note on Count XXVI: Count XXVI (unjust enrichment and money had and received) is not listed in Defendants' Table of Counts, but Defendants include it in their subject-matter jurisdiction argument (Doc. 69 at 13, referring to "Counts XXIII–XXVI"). Count XXVI is pleaded only against Massand Capital and SAS, neither of which has joined the Motion. HMIT's Response addresses this in Part II.F.